[redacted]

[redacted]

No. [redacted]

[redacted]

SARAH A. HIBBER, PLAINTIFF IN ERROR,

vs.

WILLIAM G. SMITH, JOSEPH H. PATTISON, AND [redacted] P. CRUIKSHANK, PARTNERS TRADING AS THE [redacted] CIAL EXCHANGE, THE FINANCIAL EXCHANGE, AND JOSEPH H. PATTISON.

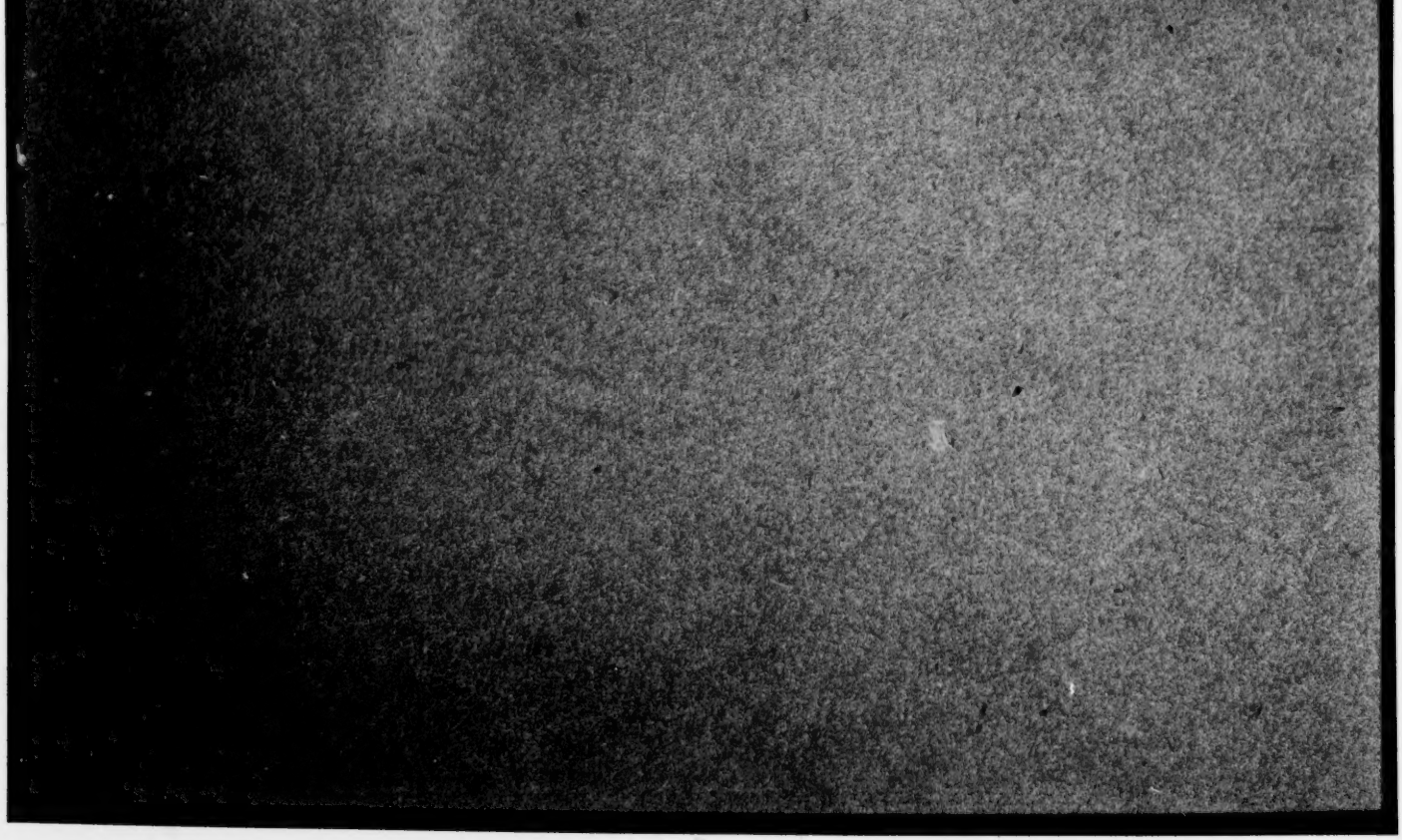
[redacted]

IN ERROR TO THE SUPREME COURT OF THE STATE OF [redacted]

[redacted]

FILED MAY [redacted], 1903.

(16,548.)



(18,548.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 59.

SARAH A. HIBBEN, PLAINTIFF IN ERROR,

vs.

WILLIAM C. SMITH, JOSEPH H. PATTISON, AND WILLIAM F. CHURCHMAN, PARTNERS TRADING AS THE FINANCIAL EXCHANGE; THE FINANCIAL EXCHANGE, AND JOSEPH H. PATTISON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

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a STATE OF INDIANA:

In the Supreme Court.

Be it remembered that heretofore, to-wit: on the 28th day of January, 1901, the same being the 55th judicial day of the November term, 1900, Sarah A. Hibben, by her attorneys, filed in the office of the clerk of the supreme court of the State of Indiana, a transcript of the record and proceedings in the Marion superior court, of said State, in a cause wherein William C. Smith was plaintiff and Sarah A. Hibben, *et al.*, were defendants, together with an assignment of error indorsed thereon, which transcript and assignment of error, together with an appeal bond, were filed in this court in term, and are in the words and figures following, to-wit:

1 Be it remembered, that among the records of proceedings had, papers filed, motion decided, rulings made, exceptions noted, judgements rendered, decrees entered, etc., in the superior court of the county of Marion, State of Indiana, are the following in the cause of

WILLIAM C. SMITH
vs.
SARAH A. HIBBEN, THE FINANCIAL EXCHANGE, Joseph H. Pattison, Elwood W. Seamans, Indiana Burmuda Asphalt Company. } Number 58774.

And be it also remembered, that heretofore, to-wit: on the first day of June, 1899, the above named plaintiff, by Harvey, Pickens, Cox & Kahn, his attorneys, filed in the office of the clerk of said Marion superior court a complaint against the said defendants, in the words and figures following, that is to say:

Complaint.

STATE OF INDIANA, *Marion County,* } *ss:*

Superior Court, Room —.

WILLIAM C. SMITH
vs.
SARAH A. HIBBEN, THE FINANCIAL EXCHANGE, JOSEPH H. Pattison, Elwood W. Seamans, and Indiana Bermudez Asphalt Company. } No.—.

2 The above named plaintiff complaining of defendants above and hereinafter named says, that the town of Irvington is a town corporation, duly established under and by virtue of the laws of Indiana. That on to-wit:—the 23rd day of February 1898 the board of trustees of said town of Irvington declared, by proper resolution duly and unanimously adopted, that it was then necessary to improve the roadway of Washington street in said town between

Central avenue and Wallace street in said town. That said resolution declared the kind, size and location of such needed improvement and designated the terminal point thereof.

That thereafter due and lawful notice for ten days of the passage of said resolution was given for two weeks in the Indianapolis Sentinel a newspaper of general circulation, printed and published in Marion county, Indiana, in which county said town is and was located and published in said town.

Said notice stating the time and place when and where the property holders along the line of said proposed improvement could make objection thereto.

That said board of trustees also caused notice by publication according to law, to be given for three successive weeks that said board would on a day therein receive proposals for contract for making such improvement.

That after a hearing of the property owners and after receiving bids according to the respective notices therefor said board confirmed said resolution of necessity and ordered that said roadway be improved with brick according to said resolution, and said board awarded said contract on April 4, 1898 to John Moore, he being the lowest and best bidder, and thereafter on the 30th day of April, 1898,

3 said Moore entered into a contract with said board of trustees for the construction of said improvements in accordance with said resolution and specifications, and gave bond therefor to the approval of said board and entered upon the execution of said work.

That thereafter on July 22, 1898 by and with the consent and ratification of said trustees said Moore assigned his said contract to this plaintiff who thereupon accepted the terms of said contract and executed to the approval of said trustees a bond according to law and entered upon the execution of said contract and continued so to do until said improvement was completed and accepted by said trustees.

That said trustees caused the cost of said improvement to be assessed in all things according to law against the property and lots abutting and bordering on said part of said street so improved and benefitted thereby.

That at the time said improvement was so ordered the defendant next herein named, owned the property next herein described and bordering on said improvement in the number of feet named and assessed for the amount named, to-wit:—

Sarah A. Hibben:

Lot	53	Pattison's	University	place	40	ft.....	$141.60
"	54	"	"	"	40	"	141.60
"	55	"	"	"	40	"	141.60
"	56	"	"	"	40	"	141.60
"	57	"	"	"	40	"	141.60
"	58	"	"	"	40	"	141.60
"	59	"	"	"	40	"	141.60
"	60	"	"	"	92 50/100	"	327.45

All that part of west half of southwest quarter of section 3, township 15 north, range 4 east, fronting south on Washington street 1157 02/100 feet measuring east from a point — feet east of the west line of said quarter section, and extending north 150 feet the entire length of said 1157 02/100

1157 02/100 ft..... $4095.85

That final estimate of the total cost of said improvement was made and reported by the town engineer as by law required.

That said trustees gave two weeks' notice in a newspaper
4 printed and published in said Marion county, there being no such paper printed and published in such town, naming a time and place when and where a hearing would be accorded to the owners of property bordering on said improvement before a committee appointed by said board to consider such report.

That such hearing was so accorded to and had by the defendant and all other such property owners.

That said committee thereafter made report to said board of trustees recommending the adoption of said report.

That said board of trustees thereafter accorded such of said owners of property as felt aggrieved by such report on the 26th day of April, 1899, a further hearing and thereupon and thereafter on the 26th day of April 1899 said board accepted said improvement as completed in all things in accordance with the contract and specification therefor and approved said estimate and assessed against the property hereinbefore named the amount so named for and on account of said improvement.

That a copy of so much of said final estimate and assessment roll as related to the property of the defendant herein is filed herewith as part hereof, marked "Exhibit A."

That said assessment is now due with 6 per cent. interest and remains unpaid although proper and lawful notice has been given said defendant naming a place where the same could be paid and the amount and interest and all charges.

That the Financial Exchange, Joseph H. Pattison, Elwood W. Seamans and Indiana Bermudez Asphalt Co. claim some interest in the subject matter of this action and are made parties hereto that they may answer to such interest.

5 That plaintiff has been compelled to employ attorneys to prosecute this action and that a reasonable amount for the service of such attorneys in prosecuting this foreclosure is the sum of $500.00.

Wherefore, plaintiff prays that said lien *is* foreclosed against said property for the amount including interest and attorney's fees thereon, and for sale of said property for the satisfaction thereof and for all proper relief in the premises.

HARVEY, PICKENS, COX & KAHN,
Pl'ff's Attorneys.

EXHIBIT A.

Sheet 1. South side. Sheet 2 S. side.
46–50 51–53.

IRVINGTON, INDIANA, *Jan.* 28, 1899.

To the town board of Irvington, Indiana:

I herewith report an estimate roll for grading and paving with brick Washington St. from Central Ave. to Wallace St. Authorized by special improvement resolution No. 189 based upon the terms of the contract of W. C. Smith, contractor for said work; approved by the town board the — day of —— 189–.

Total length frontage of improvement 5126 15/100 feet.
Total cost of improvement $18,146 57/100.
Average cost per lineal front foot 3 54/100.

Property frontage.
Total allowance to property owners
Total cost of work done by contractor.

No.	Owners' names.	No. of feet.	Description.	No. of lot.	Addition or subdivision.	Assessment for work done by contractor.
						Dollars. Cents.
46	Sarah A. Hibben.....	40	Copy Exhibit....	53	Pattison's University	141.60
47	" "	40	"A"	54	place	141.60
48	" "	40	.....	55	.....	141.60
49	" "	40	.....	56	.....	141.60
50	" "	40	.....	57	.....	141.60
51	" "	40	.....	58	.....	141.60
52	" "	40	.....	59	.....	141.60
53	" "	92.50	.....	60	.....	327.45
36	" "	1157.02	Pt. W. ½ of S. W. ¼ sec. 3–15–4..	.....	.....	4095.85
						5414.50

I hereby certify that the above estimate is correct.

JOHN V. COYNER,
Town Civil Engineer.

7 And afterwards, to wit: on the first day of June, 1899, the same being the 23rd judicial day of the May term, 1899, of said superior court, before the Hon. John L. McMaster, James M. Leathers and Vinson Carter, judges in general term thereof, the following proceeding was had herein: "Ordered, that cause, number 58774, be assigned to room three (3) for trial."

And afterwards, to wit: on the 22nd day of September, 1899, being the 17th judicial day of the special term of said superior court, before the Hon. Vinson Carter, judge presiding in said room three (3) the following proceeding was had herein, viz:

"Now comes the defendant Sarah A. Hibben by counsel and files her demurrer to the complaint in this cause, in the words and figures following:"

Demurrer to Complaint.

STATE OF INDIANA, } ss:
Marion County, }

In the Marion Superior Court, Room 3.

WILLIAM C. SMITH
vs.
SARAH A. HIBBEN ET AL. } Cause No. 58774.

Comes now the defendant, Sarah A. Hibben, and for her separate demurrer to plaintiff's complaint filed herein, says:—

First. That the same does not state facts sufficient to constitute a cause of action.

M. W. HOPKINS,
Att'y for Defendant Sarah A. Hibben.

Demurrer to Complaint Overruled.

And afterwards, to wit: on the 19th day of October, 1899, being the 16th judicial day of the October term 1899 of said court, before the same hon. judge, the following proceedings were had

8 herein: "Come the parties by counsel, and the court, being fully advised in the premises, over-rules the demurrer of the defendant, Sarah A. Hibben, to the complaint herein, to which ruling said defendant at the time excepts and she is ruled to answer over."

And afterwards to wit: on the 7th day of February, 1900 being the third judicial day of the February term, 1900, of said court before the same hon. judge, the following proceedings were had herein, viz:

Comes the defendant, Sarah A. Hibben, by counsel, and files her answer in four paragraphs to the complaint herein, as follows, viz:

STATE OF INDIANA, } ss:
County of Marion, }

In the Superior Court of Marion County, Room 3.

WILLIAM C. SMITH
vs.
SARAH A. HIBBEN, THE FINANCIAL Exchange, Joseph A. Pattison, Elwood W. Seamans, and Indiana Bermudez Asphalt Company. } Cause No. 58774. Answer of Sarah A. Hibben.

1" Par. of Answer of Hibben.

First paragraph. The defendant, Sarah A. Hibben, for her separate first paragraph of answer to plaintiff's complaint, denies each and every material allegation therein contained.

2" Par.

Second paragraph. The defendant, Sarah A. Hibben, for her separate and second paragraph of answer to plaintiff's complaint says: That the street improvement set out in plaintiff's complaint was made and the lien therefor sought to be enforced in said complaint was attempted to be created by the board of trustees of the
9 town of Irvington under the authority of and in accordance with the provisions of an act of the General Assembly of the State of Indiana entitled "An act concerning powers and duties of cities and incorporated towns and their common councils and boards of trustees and providing the mode and manner of making street and alley improvements and building sewers and providing for the mode and manner of enforcing the payment of the costs of street and alley improvements and building sewers and permitting cities or incorporated towns to issue street and sewer improvement bonds and repealing all conflicting laws and declaring an emergency." Approved March 8, 1889, being chapter CXVIII of the Laws of the State of Indiana passed at the fifty-sixth regular session of the General Assembly, as amended by an act entitled "An act to amend sections four (4), seven (7) and ten (10) of 'An act concerning powers and duties of cities and incorporated towns and their common councils and boards of trustees and providing for the mode and manner of making street and alley improvements and building sewers and providing for the mode and manner of enforcing the payment of the cost of street and alley improvements and building sewers, and permitting cities and incorporated towns to issue street and sewer improvement bonds, and repealing all conflicting laws and declaring an emergency.' Approved March 8, 1889, and declaring an emergency." Approved March 6, 1891, being chapter CXVIII of

the Laws of the State of Indiana passed at the fifty-seventh regular session of the General Assembly; and also under the authority of and in accordance with the provisions of an act entitled "An act to extend the benefit of paying assessments for street, alley or sewer improvements in installments." Approved March 3, 1893, being chapter CXXIII of the Laws of the State of Indiana passed
10 at the fifty-eighth regular session of the General Assembly, all being sections 4288 to 4299, both inclusive, of the Revised Statute- of 1894.

That said acts and amendments thereto as aforesaid and each and every of the sections thereof, the same being sections 4288, 4289, 4290, 4291, 4292, 4293, 4294, 4295, 4296, 4297, 4298 and 4299, of said Revised Statutes of 1894 are all, and each section separately, opposed to and in violation of section one of the fourteenth amendment to the Constitution of the United States of America and that said sections and each of them are null, void and invalid and of no effect.

3" Par. Answer.

Third paragraph. The defendant, Sarah A. Hibben, for her separate and third paragraph of answer to plaintiff's complaint says:

That on the 23rd day of February, 1898, the board of trustees of the town of Irvington, by resolution and ordinance declared the necessity for and provided for making street improvements in Washington street in said town from Central avenue to Wallace street, which resolution and ordinance was in the words and figures following, to-wit:—

"Resolved by the board of trustees of the town of Irvington, Indiana, two-thirds of the members of said board concurring:

First. That a necessity exists for the improvement of the roadway of Washington street in the said town from Wallace street to Central avenue.

Second. That the said improvement shall be made and in the following manner, to-wit:—The said roadway shall be graded to a width of forty-two feet according to the following grade, to wit:—
11 Beginning at Wallace street at an elevation of 801 feet; thence east on a descending grade of 75/100 of a foot per one hundred feet to Pleasant run; thence on an ascending grade of 40/100 of a foot per one hundred feet for a distance of 700 feet; thence on an ascending grade of 2 60/100 feet per one hundred feet for a distance of 500 feet; thence on an ascending grade of 55/100 of a foot per one hundred feet for a distance of 1235 feet; thence on an ascending grade of 1 30/100 feet per one hundred feet for a distance of 600 feet; thence on an ascending grade of 1 15/100 feet per one hundred feet to the east line of Central avenue.

There shall be constructed upon the said grade as thus prepared, an improvement of one of the following kinds as may be determined by the board upon the opening of bids on each kind, viz:—

1st kind. Commencing eight feet on each side of the center of the

graded portion of said roadway, there shall be placed to the full width of the said graded portion, a macadam roadway consisting of three layers of broken limestone to a depth of fourteen inches in all and an additional layer of limestone screenings two inches thick, with a curb of stratified limestone, and along the sides of the improvement next to the street car tracks in the center of the roadway shall be placed a marginal curb of stratified limestone.

2nd kind. Commencing eight feet on each side of the center of the graded portion of said roadway a brick pavement shall be constructed of paving blocks laid upon a concrete base, with combined curb and gutter composed of cement, sand and crushed granite, and along the side of the improvement next to the street car tracks in the center of the roadway shall be placed a marginal curb of stratified limestone.

3rd kind. Commencing eight feet on each side of the cen-
12 ter of the graded portion of said roadway, an asphalt pave-
ment shall be constructed laid upon a concrete base, with combined curb and gutter composed of cement, sand and crushed granite, and along side of the improvement next to the street car tracks in the center of the roadway shall be placed a marginal curb of stratified limestone.

All of the said work to be done to the satisfaction of the town engineer and the said board of trustees and in accordance with the plans and specifications therefor adopted by said board.

Third. The cost of the said improvement (except the proportion thereof occupied by street and alley crossings) shall be assessed per lineal foot against the real estate abutting thereon. The assessment if desired shall be paid in ten annual installments to each of which shall be added interest at six per cent. per annum payable semi-annually from the date of the final estimate and collected as provided by law. A bond or bonds shall be issued in anticipation of the collection of the said defined assessments unless the property owners pay their said assessments before said bonds are issued. All to be done in accordance with the provisions of an act of the General Assembly of Indiana concerning street improvements, approved March 8, 1889, and the acts amendatory thereof.

Fourth. The town clerk is hereby directed to give ten day's notice of the passage of this resolution for two weeks in the Indianapolis Sentinel, a daily newspaper of general circulation published in Indianapolis, Indiana, and in said notice it shall be stated that the property owners along the line of the said proposed improvement
may make objection to the necessity for either or all of the
13 several kinds of improvements herein specified at a meeting
of the said board of trustees to be held in their office in the said town on the 21st day of March, 1898, at 8 o'clock p. m.

Fifth. The town engineer is hereby directed to set the proper grade stakes and also to advertise by publication one day each week for three successive weeks in the Indianapolis Sentinel, a daily newspaper of general circulation published in Indianapolis, Indiana, that sealed proposals for the execution of each kind of improvement

herein provided for will be received by said board of trustees at their office in the said town on the 28th day of March, 1898, at 8 o'clock p. m.

Sixth. An emergency exists for the immediate taking effect of this resolution, therefore the same shall be in force from and after its passage."

That on the 24th day of February, 1898, and on the 3rd day of March, 1898, the said board caused to be published in the Indianapolis Sentinel, a newspaper of general circulation published in the city of Indianapolis, Marion county, Indiana, a notice of the passage of said resolution and giving notice to property owners that there would be a meeting of the board at 8 o'clock p. m. on the 21st day of March, 1898, at which time such property owners might make objection to the necessity for any or all of the three kinds of improvements mentioned in said resolution.

That on the 24th day of February and on the 3rd and 10th days of March, 1898, the town civil engineer of said town, by direction of said board, caused to be published in the Indianapolis Sentinel, a newspaper of general circulation published in the city of Indianapolis, Marion county, Indiana, a notice that on the 28th day of March, 1898, at 8 o'clock p. m. the said board would receive
14 proposals for making each of the three kinds of improvements mentioned in said ordinance; and said notice provided that the work should be done according to the said resolution of February 23, 1898 and according to the plans and specifications on file in the office of such town engineer.

That on the 7th day of March, 1898, the said board by ordinance approved the specifications for said improvement; that the specifications so approved were the general specifications of the city of Indianapolis for 1898, subject to necessary verbal changes, and that the specifications so approved were placed on file in the office of said town engineer and were the basis of the bids hereinafter mentioned, including the bid finally accepted by said board; that said specifications provided among other things, that upon notice from the town board the contractor should discontinue work during the winter months and place the work in condition to accom-odate the public and protect the work; that during the progress of the work and during a period of seven years from the date of the approval of the assessment roll, the whole work should be at the contractor's risk and he should be responsible for any and all damages to persons or property on account of the work, whether occasioned by rise in the river, floods, back water, caving, settling of trenches or foundations of buildings, or any portion of the improvement, derangement of alignment, defect in surface, foundations or other appurtenances, or otherwise occasioned; that without additional compensation the contractor should make good any such damage to the work and should make good any defect in the workmanship, materials or condition of the work during the said period of seven years; that said contractor should keep said work in repair during the

said period of seven years and should make all repairs
15 at such time as directed by the board or the engineer, and that such obligation on the part of the contractor should cover and include all repairs growing out of the imperfection or unsuitability of materials or compositions, too great or too little moisture, all defects of workmanship, extreme of heat or cold, and all other defects of climate, and covers all other excessive deteriorations, viz:—any holes or cracks in said pavement and any defects resulting from the decomposition of the wearing surface or foundation, and that the pavement at the expiration of the said period of seven years should be in good condition, and present surface so true and even that it should in no way be an obstruction to travel and have drainage so perfect that water should collect in no place to a depth of more than one-quarter of an inch; that the determination of the character, amount, extent and necessity for repairs should rest entirely with the board and its decision should be final and obligatory upon the contractor and that such determination might extend to the total reconstruction of the whole body of the work; that upon failure of the contractor to so repair or reconstruct, the said board might make such repairs or reconstruction at the expense of said contractor; that said board should retain out of the cost of said improvement a sum equal to 20 cents per square yard as a repair guarantee fund to secure the repair and maintenance of said pavement by the contractor in accordance with the contract for the construction, repair and maintenance thereof; that the contractoe should deposit with the said town a sum equal to 3 per cent. of the total cost of the said improvement as a coupon payment fund to meet the payments on delinquent bonds and coupons issued on this improvement; that in bidding the price should be stated per lineal front foot on each side, the amount to be ascertained by dividing
16 the total cost of the improvement including all appurtenances and maintenance for the said period of seven years by double the length of the street given in the specifications; that the contractor should not assign or transfer the contract or sublet the work, or any part thereof; that the contractor must have an office or agent in the city of Indianapolis during the period of construction and during said period of seven years; that all surplus earth removed by the contractor should be hauled to such streets, alleys or other places as might be directed by the said board and engineer within a distance of 1000 feet and shaped to the satisfaction of the said board and engineer; that the curbing should be under the same guarantee as the street surface; that the board would reserve the right to change the kind of brick to be used in said pavement even after the contract was let; that the estimated length of street to be improved was 5155 lineal feet; that the width to be graded was 42 feet; that the width to be improved was 26 feet; that the estimated amount of gravel concrete was 15,892 square yards; that the estimated amount of 4 inch brick surface was 15,892 square yards; that the estimated amount of curb and gutter was 9,600 feet; and 387 feet round corner curb; that the estimated amount of marginal stone was 10,485 feet; that there were five man holes and catch basins

and 14 iron inlets; and 10,310 feet drain tile; that the guarantee fund would be estimated upon the area of the pavement from face to face of curbing.

That on the 21st day of March, 1898, this defendant along with other property owners along the line of said proposed improvement filed with the said board of trustees their written objections to said proposed improvement; that the total frontage of property
17 owners along said proposed improvement was 9,266.65 feet; that said owners so objecting owned an aggregate frontage of 6,263.28 feet; that in said written objections the objectors asked that neither of the improvements provided for in said ordinance of February 23, 1898, be made for the reason that the probable expense would be largely out of proportion to the value of the abutting property, in several instances exceeding its value and working a forfeiture of the property, and that either would be of no more value to the property than a less expensive improvement.

That on the 28th day of March, 1898, said board received and opened bids for said improvements; that one John Moore bid for brick pavement $3.56 per front foot on each side; that one Daniel Foley bid for macadam improvement $2.45 per front foot on each side; that the Indiana Bermudez Asphalt Company bid for an asphalt pavement $4.43 per front foot on each side; that said bids were the lowest bids on each of the three kinds of improvement proposed; that said bids were referred to the committee on streets, alleys and contracts; that on the 4th day of April, 1898, said committee reported to said board recommending that the contract be awarded to said John Moore; that said report was adopted and on the said date the said board adopted a resolution providing for a brick roadway improvement in accordance with the resolution of February 23, 1898, and the plans and specifications before adopted, which resolution was in the words and figures following, to-wit:

"Resolved by the board of trustees of the town of Irvington, Indiana, two-thirds of the members of said board concurring, That whereas it has heretofore been declared by this board by a resolution passed on the 23rd day of Feb. 1898, that a necessity
18 existed for the improvement of the roadway of Washington street in the said town from Wallace street to Central avenue, and that the same should be graded as therein provided and that upon such grade there should be constructed one of three kinds of improvements therein set out as might be determined by this board upon the opening of bids on each of said kinds, now therefore it is hereby resolved by the said board that the said roadway shall be improved by constructing thereon the following improvement, viz: a brick pavement of paving blocks laid upon a concrete base, with combined curb and gutter composed of sand, cement and crushed granite and along the side of the improvement next to the street car tracks in the center of the roadway shall be placed a marginal curb of stratified limestone, the same being one of the kinds of improvement provided in the said resolution, which shall be constructed in accordance with the provisions of the said resolution

passed on the 23rd day of Feb. 1898 and the plans and specifications for such improvement heretofore adopted by this board, and resolved further that the bid of John Moore for the construction of the said improvement heretofore received by this board proposing to make the same for $3.56 per lineal foot on each side be and the same is hereby accepted, and the said John Moore shall enter into a formal contract for the performance of the said work and file his bond as provided in the specifications within 10 days and the judiciary committee is directed to prepare said contract.

Resolved further That all the checks received with bids upon the said improvement, except the check received with the bid of John Moore, be returned by the treasurer to the persons to whom they belong.

The resolution was unanimously adopted."

19 That on the 11th day of April, 1898, the said board by ordinance provided that the Indiana paving block manufactured at Brazil, Indiana, should be used in making said improvement.

That on the 11th day of April, 1898, the contract for said improvement was approved by said board; that on the 25th day of April, 1898, the said contract and the bond of the said Moore were ordered spread of record and the finance committee was authorized to accept the bond if in accordance with specifications; that on the 30th day of April, 1898, and in pursuance of the above mentioned proceedings, said board entered into and signed a contract with said John Moore and accepted his bond to construct the improvements hereinbefore mentioned and described, which contract and bond were in the words and figures following, to-wit:—

"This agreement, made and entered into this 18th day of April, 1898, by and between John Moore of the county of Marion and State of Indiana, party of the first part, and the Town of Irvington, State of Indiana, Marion county, party of the second part, under and by virtue of an act of the General Assembly of the State of Indiana entitled "An act concerning powers and duties of cities and incorporated towns and their common councils and board of trustees and providing the mode and manner of making street and alley improvements and building sewers and providing for the mode and manner of enforcing the payments of the costs of street and alley improvements and building sewers and permitting cities or incorporated towns to issue street and sewer improvement bonds," approved March 8, 1898, and acts amendatory thereof.

Witnesseth: That the party of the first part covenants and

20 agrees to improve the roadway of Washington street in the town of Irvington, Indiana, from the west property line of Wallace street to the east property line of Central avenue, by grading the same to a width of 42 feet and by paving to a width of 11½ feet on each side of said roadway, with the best quality of standard brick block, manufactured by the Indiana Bermudez Asphalt and Paving Company at Brazil, Indiana. Said block to be as good in

all respects as the sample block submitted to the board of trustees on the day of letting their contract, which blocks are duly registered and are now in the office of said board; the block surface to be laid on a six inch gravel concrete foundation; by placing a marginal curb finish at all street and alley intersections, also along either side of said improvement next the street railroad company's right of way; by curbing and guttering with cement curb and gutter; paving with said block and curbing and guttering as aforesaid the wings of intersecting streets and alleys to the property lines on said Washington street and by filling intersections of block with Portland cement grant filling, all for the sum of three dollars and fifty-six cents ($3.56) per lineal foot on each side of said improvement complete, according to a resolution adopted by the board of trustees of said town on the 23rd day of February, 1898, and the plans, profiles and specifications are made a part hereof as fully and effectually as if copied herein at full length. * * *

The party of the first part further contracts and agrees that he will exercise in the prosecution of said work, all proper skill and care; that he will properly and fully guard and protect all excavations and dangerous places, and will use all due and proper precaution to prevent injury to any property, person or persons, what or whomsoever; that for and during the time of the making of
21 said improvement, and the period for which the same is to be maintained and kept in repair by him, he will save the town of Irvington harmless from any and all liability growing out of any injury or damage to property or persons because of any neglect or fault of himself or his agents or employees in the execution of this contract, or because of any neglect or fault of himself or his agents or employees in any matter connected therewith or related thereto, and to pay any judgement with costs, which may be obtained against the town on account of any such injury or damage.

It is mutually understood and agreed that the second party shall be liable to said first party for the contract price of such improvement, whether represented by bonds or assessments, to the extent of the moneys actually received by said town from assessments or bonds growing out of said improvement, and also for the improvement of that part of said street which shall be occupied by the street and alley crossing and for no more.

The said party of the second part contracts and agrees that if any of the property owners on said street elect to pay said assessments in ten equal annual installments or provided by said act, it will make and issue to said first party improvement bonds bearing interest at the rate of six per cent. per annum. covering such deferred payments.

Said work shall be commenced within thirty days from the execution of this contract and shall be completed according to its terms, on or before the 1st day of August, 1898, unless said time be extended in writing, by the board of trustees of said town. If the said party of the first part fails or neglects to commence said work on or before the time mentioned, said board of trustees may declare this

(re-let)
contract null and void, and may *re-elect* the same, and in the
22 event said first party or his sureties fail or neglect to prosecute said work with such vigor as, in the opinion of the board of trustees will complete the same within the time above fixed and fail to increase his force on notice from said board, then said board may declare this contract null and void and adjudge the same to have been abandoned and forfeited, and may re-let or require his sureties to complete the same, as said board shall elect; and said first party and his sureties shall be liable for all damages that may accrue by said failure to perform said work according to this contract, and shall be entitled to recover nothing from said town or the property owners along said improvement for work already performed or materials used, and such materials shall be retained by and belong to said town.

Said first party further contracts and agrees to pay any and all moneys due any contractor, person or persons, furnishing any material by contract for said work and to pay any and all laborers employed by said party of the first part for any work done in the prosecution of said improvement.

It is hereby expressly agreed that no assignment of this contract shall be made to any party without the consent of said board of trustees in writing, and any assignment without such consent first had shall nullify this contract.

It is further agreed that the said town shall not be liable to said first party or his assigns for any delay or loss in the payment of assessment or interest thereon by the property owners who fail or refuse to sign a waiver, availing themselves of the ten year installment plan of payment as provided by law, or for attorney's fees; and that, although suits for the collection of such assessments
23 may be brought in the name of said party of the second part, said town shall not be or be held liable for the cost or expense of such suits, or for any failure to recover the amount or amounts therein claimed to be due.

The party of the first part hereby consents that the said town shall retain out of the total amount shown by the final estimate to be due from the said town on account of street and alley crossings, a sum equal to twenty cents per square yard for each square yard of pavement constructed, which sum shall be and constitute a repair guarantee fund in the hands of said town for the purpose of securing the repair and maintenance of said pavement by the contractor to the satisfaction of the board. In the event the sum above specified shall exceed the amount due said contractor from said town on account of street and alley crossings, then said contractor shall deposit a sum sufficient to make said guarantee fund equal to twenty cents per square yard for each square of improvement constructed. This guarantee fund, or only such part of it as shall remain in the hands of the town unexpended as above provided at the expiration of said guarantee period, shall then be paid to the contractor with interest at the rate of five per cent. per annum.

Provided: that no interest shall be paid upon any part of said fund which the town may have been compelled to expend for repair at any time within said guarantee period of seven years.

Provided: also that no interest shall be paid until the ex-
24 piration of said guarantee period. Interest however may be paid annually on order of the board if the roadway is properly maintained by the party of the first part.

The contractor, party of the first part, hereby contracts and agrees to deposit with the town upon the certificate of the engineer showing the total cost of the improvement, a sum equal to three per cent. of said total cost, which sum shall be and constitute a fund in the control of the town's treasurer to be known as the coupon payment fund, which fund shall be used by said treasurer to meet the payment of all delinquent bonds and coupons issued by the town upon their improvement. The moneys taken from such fund for the purpose herein named shall be replaced and paid back into the fund as rapidly as such delinquencies are paid into the treasury. Said treasurer shall issue to the party of the first part a certificate of the amount retained, which shall not bear interest and shall be payable to the contractor or his order by the treasurer of said town two (2) years after the date of its issue.

It is hereby agreed that neither of said funds above specified shall at any time during the period for which they are retained be decreased by the said party of the first part.

In the event the pavement during the guarantee period is not in good condition and repair to the satisfaction of the board of trustees of said town, and if the first party shall refuse or neglect to put the same in repair to the satisfaction of said board on fifteen (15) days' notice, said board may cause the same to be done and pay for the same out of the guarantee fund above provided for, and said sum or sums so paid for such repairs out of said guarantee fund shall con-
stitute and be considered a payment by the said town upon
25 the amount due from it to the contractor on account of the cost of street and alley crossings, and the town shall retain the balance of said fund, if any, in said repair guarantee fund for use in future repairs. Should the cost of such repairs made by order of the board of trustees exceed the amount retained as above provided, or the amount of said repair fund remaining on hand at the time of making such repairs, the party of the first part shall be held responsible to the town for the amount of such excess, and such excess shall be collected by suit from the contractor.

The party of the first part agrees as soon as the assessment roll for their improvement is approved by the board of trustees and placed on the duplicate in the office of the town treasurer, to at once mail to each name on said assessment roll a notice, stating the amount of such assessment, when and where payable, and naming the last day upon which the owner may sign for the ten year plan. Such notice shall be properly stamped and addressed and put in the post office.

The right to construct any sewer or sewers, or to lay any water

or gas main or electric conduits or receiving basins and culverts, or to build up or adjust any man-hole, not otherwise provided for, or for supplying water or gas stop cocks in said street, and to grant permits for house connections with sewers, or with water or gas pipes or conduits, at any time prior to the completion of the improvement, is expressly reserved by the board of trustees, and the said board reserves the right to suspend the work on any part of said street, at any time during the construction of the same, for the purposes above stated; and said first party shall not interfere with or place any impediment in the way of any person or persons who may be en-
26 gaged in the construction of said sewer or sewers, or in laying said water or gas mains or conduits, or in making connections therewith, or doing other work above specified. In case, the contractor shall not be entitled to any damages, either for the digging up of the street or for the delay; but he shall be allowed and be paid for any additional work or material that may be necessary on his part, such reasonable sum (not to exceed the contract rate) as may be agreed upon between him and the said board, and the time for completing his contract shall be extended as many days as he was then delayed.

In the event any person, firm or corporation shall desire with the consent and approval of the board of trustees to enter into said pavement during the guarantee period of seven years, the contractor shall upon payment to him by said person, firm or corporation or by said town, of a sum sufficient to compensate said contractor for properly replacing said pavement, give his consent for the entering into said improvement, and such entering shall not vitiate or impair the guarantee given by the contractor upon said improvement or any part thereof. The contractor in such case, shall replace the pavement under the conditions named above, and the guarantee shall in no wise be impaired.

To each of the conditions and stipulations of this contract, the undersigned, John Moore, party of the first part, and Town of Irvington, party of the second part, each binds himself and itself and their successors and assigns.

In witness whereof, we, the foregoing named parties hereunto set our hands, this 18th day of April, 1898.

JOHN MOORE.
TOWN OF IRVINGTON.
HILTON U. BROWN,
President Board of Trustees.
C. B. CLARKE, *Clerk.*

27 ***Bond.***

Know all men by these presents that I, John Moore, as principal, and Joseph T. Gest, Daniel Lesley and Geo. H. McCaslin, of the county of Marion and State of Indiana, as sureties, are held and firmly bound to the Town of Irvington, Indiana, in the sum of

eighteen thousand, three hundred and fifty dollars ($18,350.) for the payment of which well and truly to be made we jointly and severally bind ourselves our heirs, executors, administrators and assigns firmly by these presents.

The conditions of the above obligation are such that if the above named John Moore shall faithfully comply with the foregoing contract made and entered into this 18th day of April, 1898, with the Town of Irvington, Indiana, and shall fulfill all the conditions and stipulations therein contained, according to the true intent and meaning thereof, in all respects, then this obligation to be void, otherwise to be and remain in full force and virtue in law. In the event the said town shall extend the time for the completion of said work, such extension shall not in any way release the sureties on this bond.

This shall be a construction bond, and the sureties to the same shall not be held responsible for the maintenance and repair of the pavement after it has been accepted by the second party, but such sureties shall be held responsible for the faithful compliance with all the other conditions and restrictions set out in the contract.

Witness our hands and seals the day and year last above written.

JOHN MOORE. [SEAL.]
JOSEPH T. GEST. [SEAL.]
DANIEL LESLEY. [SEAL.]
GEO. H. McCASLIN. [SEAL.]"

28 That the said John Moore refused to proceed with the work of construction under said contract and on July 20th, 1898, so notified said town board to that effect; that thereupon said Moore entered into an agreement with William C. Smith, who for more than six months prior to such time had been the town civil engineer, to assign said contract to said Smith; that thereafter and on the 22nd day of July, 1898, the said William C. Smith offered to said board his resignation as said engineer, which resignation was accepted; that on the same day said John Moore assigned and transferred his said contract to the said William C. Smith; that on the same day the said board by resolution approved of and accepted said assignment, and released said John Moore from all liability on his said contract and bond, which resolution was in the words and figures following, to-wit:

"Whereas, the board of trustees of the town of Irvington passed a declaratory resolution for the improvement of Washington street on the 23rd day of February, advertising for the reception of bids on the 28th day of March, 1898, and

Whereas, at said date of receiving bids said board was restrained by the superior court on application of one Hay, a non-resident, supported by Harold Hibben, a non-resident. That thereupon said board received said bids and subsequently on April 13, 1898, said superior court held said resolution good, valid and legal and held in all things in favor of said board and thereupon said Hay prayed an appeal to the supreme court, said appeal being dismissed by said

court in due time. In the meantime the said Hibben, non-resident, filed before the Hon. Judge L. M. Harvey of the superior court, a like suit, in fact a duplicate of the Hay case, except as to name of plaintiff and

Whereas, this board awarded the contract to John Moore
29 for the improvement of said street with brick on his bid of *$3.56 per lineal foot on each side, and*

Whereas, said Moore entered into the execution of said contract and bond on the 18th day of April, 1898, and

Whereas, on the 20th day of July, 1898, said Moore served notice formally upon said board that he was unable to fulfill his contract and was ready and willing to assign the same to any one acceptable to said board, and

Whereas, said Moore, by written consent of said board, having assigned said contract and matters and things thereunder to William C. Smith, which said assignment is in the words and figures as follows:— to-wit:—

IRVINGTON, *July* 22, 1898.

For a good consideration, I, John Moore, hereby assign and transfer to William C. Smith all my right, title and interest, without recourse on me, in and to a certain contract to which this is attached, between myself and the Town of Irvington, Marion county, Indiana, to construct and build a brick roadway on Washington street in said town from Central avenue west to Wallace street.

This assignment of contract, before it shall be valid, shall by resolution duly entered of record and approved by the board of trustees of the Town of Irvington, and in, and by the terms thereof, the said board of trustees shall accept William S. Smith as the contractor to do said work on terms and conditions given in said contract, and further releasing John Moore from any and all responsibility on account of said contract and bond filed by him as such contractor with said board of trustees.

In witness whereof, I have hereunto set my hand this 22nd day of July, 1898.

JOHN MOORE.

30 STATE OF INDIANA, } ss:
Marion County, }

Personally appeared before me John Moore and signed and acknowledged the annexed and foregoing assignment of contract as his free act and deed for the uses and purposes therein stated.

Witness my hand and seal, this 22nd day of July, 1898.

JASON E. BAKER,
Notary Public, Marion Co., Ind.

Therefore be it resolved by the board of trustees of the town of Irvington, Indiana, that the said assignment is hereby accepted, ratified and approved and that William C. Smith is the recognized

contractor for the construction of said street under said contract and that the said Moore by virtue thereof is hereby released from all obligation thereunder, and his bond is hereby cancelled.

Further, be it resolved that the said William C. Smith be required to file with said board a bond in the sum of $18,350 within a reasonable time from the adoption of these resolutions and shall place on file an indemnifying bond that he will carry out the provisions of this resolution, and in all respects complete the work according to plans and specifications adopted by the board."

That thereupon said William C. Smith accepted said assignment; that on the 29th day of July, 1898, said Smith gave bond for the carrying out of said work according to the said contract with said Moore; and the board approved said bond; that on said 29th day of July said board extended the time for the completion of said improvement from August 1, 1898, to December 1, 1898; that afterwards during the construction of said improvement the said board employed said William C. Smith to do the work of a civil
31 engineer for said town of Irvington.

That on the 10th day of August, 1898, the said board employed John V. Coyner as town civil engineer for the balance of the year 1898; that on the 31st day of August, 1898, the said board provided that the contractor should change the specifications by leaving out the drain tile and allow a rebate of two cents per lineal front foot on each side; that on the 26th day of November, 1898, the said board extended the time for completion of said improvement from December 1, 1898 to January 1, 1899; that on the 28th day of December, 1898, the board extended the time for the completion of said improvement from January 1st, 1899 to February 1, 1899.

That on the 28th day of January, 1899, the town civil engineer submitted to the said town board the final estimate of the total cost of said improvement and at the same time made to said board a report upon said improvement, which report apportioned the entire cost of such improvement against all the abutting property on the basis of $3.54 per lineal foot on each side, which report was in the words and figures following, to-wit:—

"INDIANAPOLIS, INDIANA, *Jan'y* 26, 1899.

To the town board of Irvington.

GENTLEMEN: I beg to submit to you for your consideration, the assessment rolls for the improving of Washington street from Central avenue to Wallace street as per Mr. W. C. Smith's contract.

This is not to be considered as an acceptance of the work, as there are several things to be done by the contractor before the contract is completed. Some of these things can be done at this time of year and are being pushed as fast as the weather will permit, but others must lay over until spring and settled weather, when every-
32 thing can be completed and a final inspection made before the improvement is accepted.

I may mention here that item No. 60 on sheet 2 south side is not incorporated within the town.

I also submit the extra for paving done by the contractor, Mr. Smith. This extra was caused by the changing of the tracks from double to single at the curve of Washington Street and Central Avenue intersection. The contractor was compelled to change some of the marginal curb that had been placed in position as originally intended and the trenches were excavated for the remainder before I was notified of any change.

I consider the price, 25 cents per square foot a reasonable and just price for the same—not counting the delay and inconvenience caused by the above change of tracks.

The amount of extra surface paved—1024 8/10 square feet at 25 cents per square foot, equals $256 20/100—which I submit for your consideration.

Respectfully, JOHN V. COYNER.

April 26, 1899.

Estimate Roll, North Side.

IRVINGTON, IND., *Jan'y 28th*, 1899.

To the town board of Irvington.

GENTLEMEN: I herewith report as estimate roll for grading and paving with brick, Washington street from Central avenue to Wallace street, based upon the terms of the contract of Wm. C. Smith, contractor for said work.

Total length frontage of improvement 5126 15/100 feet Average cost per lineal front foot $3.54.—Total cost of improvement—$18,146 57/100.

33	Owner's name.	No. of feet.	Description.	Assessment.
1	Town of Irvington	43	Central avenue	$169.92
2	Susan Davis	300	Lot 31, original Irvington	1062.00
3	Francis Barber	43	Lot 9, F. E. Barber's sub. of lot 32	152.22
4	Francis Barber	44	Lot 8, F. E. Barber's sub. of lot 32	155.76
5	Henry Moore	44	Lot 7, F. E. Barber's sub. of lot 32	155.76
6	Henry Moore	44	Lot 6, F. E. Barber's sub. of lot 32	155.76
7	Town of Irvington	50	Layman avenue	177.00
8	India L. and N. Brumfield	58 35-100	Lot 1, D. P. McLeod's sub. of lot 38	206.56
9	India L. and M. Brumfield	54 34-100	Lot 2, D. P. McLeod's sub. of lot 33	206.52
10	India L. and M. Brumfield	38 34-100	Lot 3, D. P. McLeod's sub. lot 33	206.52
11	Town of Irvington	15	Alley between Layman and Ritter	53.10
12	S. Kinley	40	Lot 4, Downey's sub. of lot 34	141.60
13	John W. Scott	40	Lot 3, Downey's sub. of lot 34	141.60
14	John W. Scott	40	Lot 2, Downey's sub. of lot 34	141.60
15	James Stevenson	41	Lot 1, Downey's sub. of lot 34	145.14
16	Town of Irvington	50	Ritter avenue	177.00
17	L. Ritter	90	Pt. of lot 8, Ritter's add	318.60
18	D. D. Pike	60	Pt. of lot 8, Ritter's add	212.40
19	S. M. Richereek	50	Lot 1, McLeod, Graham and Bitler's sub	177.00
20	S. M. Richereek	50	Lot 2, McLeod, Graham and Bitler's sub	177.00
21	S. M. Richereek	50	Lot 3, McLeod, Graham and Bitler's sub	177.00
22	M. Z. Pounds	50	Lot 4, McLeod, Graham and Bitler's sub	177.00
23	Town of Irvington	50	Hunter avenue	177.00
24	J. E. Pounds	50	Lot 5, McLeod, Graham and Bitler's sub	177.00
25	J. B. Pounds	50	Pt. lot 6, McLeod, Graham and Bitler's sub	177.00
26	Ellen E. Graham	6	Pt. lot 6, McLeod, Graham and Bitler's sub	21.24
27	Ellen E. Graham	56	Lot 7, McLeod, Graham and Bitler's sub	198.24
28	Town of Irvington	50	Elm avenue	177.00
29	Oliver P. Hay	156	Lot 5 L. and C. Ritter's sub. lots 23-24	552.24
34 30	Oliver P. Hay	120	Lot 6, L. and C. Ritter's sub. lots 23-24	424.80
31	Chas. E. Newlin	120	Lot 7, L. and C. Ritter's sub. lots 23-24	424.80
32	A. V. Dickman	120	Lot 8, L. and C. Ritter's sub. lots 23-24	424.80
33	Rachael Swain	155	Lot 25, Ritter's add	548.70
34	Town of Irvington	50	Blount avenue	177.00
35	Chas. W. Reid	127	Two acres in E. ½, W. ½, S. W. ¼, sec. 3-15-4	449.58
36	Sarah A. Hibben	1157 2-100	Part W. ½, S. W. ¼, sec. 3-15-4	4095 85
37	Town of Irvington	45	National avenue	159.30
38	H. U. Brown and A. H. Hannah	353 10-100	Part E. ½, S. E. ¼, sec. 4-15-4	1249.97
39	Edward A. Caylor	167 50-100	Part vacated street and lot 48	592.95
40	Chas. E. Bernhart	167 70-100	Lot 33, Blankenship *et al.* Pleasant View add.	593.66
41	Town of Irvington	60	Summit street	212.40
42	Edward A. Caylor	173 20-100	Lot 32, Blankenship *et al.* Pleasant View add.	613.13
43	John Moore	173 20-100	Lot 17, Blankenship *et al.* Pleasant View add.	613.13
44	Town of Irvington	60	Quincy street	212.40
45	L. L. Roach	167 70-100	Lot 16, Blankenship *et al.* Pleasant View add.	593.66
46	Wm. M. and E. Roach	167 70-100	Lot 1, Blankenship *et al.* Pleasant View add.	593.69
			Total	18146.57

I hereby certify that the above estimate is correct.

JOHN V. COYNER,
Town Civil Engineer.

Estimate Roll, South Side.

IRVINGTON, IND., *Jan'y 28th*, 1899.

To the town board of Irvington.

GENTLEMEN: I herewith report on estimate roll for grading and paving with brick, Washington street from Central avenue to Wallace street, based upon the terms of the contract of W. C. Smith, contractor for said work.

Total length frontage of improvement 5126.15/100 feet.
35 Average cost per lineal front foot $3.54—Total cost of improvement—$18,146 57/100.

	Owner's name.	No. of feet.	Description.	Assessment.
1	Town of Irvington	48	Central avenue	169.92
2	C. L. and F. E. Shank	160	Lot 5, Shanks sub.	566.40
3	C. L. and F. E. Shank	60	Lot 4, Shanks sub.	212.40
4	C. L. and F. E. Shank	60	Lot 3 Shanks sub.	212.40
5	C. L. and F. E. Shank	60	Lot 2 Shanks sub.	212.40
6	C. L. and F. E. Shank	60	Lot 1, Shanks sub.	212.40
7	T. L. and M. V. Thompson	60	Lot 4 Thompson's sub.	212.40
8	J. C. and M. Barnhill	60	Lot 3 Thompson's sub.	212.40
9	T. L. and M. B. Thompson	60	Lot 2, Thompson's sub.	212.40
10	T. L. and M. B. Thompson	163 14-100	Lot 1, Thompson's sub.	577.52
11	Town of Irvington	57 78-100	Johnson avenue	204.54
12	L. L. Cross	79 33-100	Lot 35 original Irvington	280.83
13	Town of Irvington	50	Ritter avenue	177.00
14	Levi Ritter	210	Lot 1, L. & C. Ritter's sub. lot 32 Ritter's add.	743.40
15	Levi Ritter	100	Pt. lot — L. & C. Ritter's sub. lot 32 Ritter's add.	354.00
16	O. O. Carven	50	Pt. lot 3 L. & C. Ritter's sub. lot 32 Ritter's sub.	17.00
17	O. O. and C. T. Cerven	10	Pt. lor 4, L. & C. Ritter's sub. lot 32 Ritter's add.	35.40
18	W. S. and S. B. Moffett	90	Pt. lot 4, L. & C. Ritter's sub. lot 32 Ritter's add.	318.60
19	Jos. T. Gist	100	Pt. lot 32 Ritter's add	354.00
20	Town of Irvington	50	Cherry street	177.00
21	Henry Beerhans	75	Pt. lot 30, Ritter's add.	265.50
22	Sarah Shaffer	75	Pt. lot 30 Ritter's add.	265.50
23	Ellen E. Graham	60	Pt. lot 29, Ritter's add.	212.40
24	I. J. and R. J. Chase	60	Pt. lot 29, Ritter's add.	212.40
25	J. M. Stowell	70	Pt. lot 29, Ritter's add.	247.80
26	Town of Irvington	50	Downey avenue	177.00
27	Edward Kettenbach	58	Pt. lot 28 Ritter's add.	205.32
28	Edward Kettenbach	125	Pt lot 27 Ritter's add.	442.50
29	John T. Cusack	125	Lot 26 Ritter's add.	442.50
	30 Town of Irvington	6½	Alley between Downey and Commercial	21.24
36	31 R. W. and C. J. Long	42 91-100	Lot 1 Walker's Sunny Side sub.	151.90
	32 R. W. and C. L. Long	52 91-100	Lot 2 Walker's Sunny Side sub.	151.90
33	R. W. and C. L. Long	42 91-100	Lot 3 Walker's Sunny Side sub.	151.90
34	Town of Irvington	50	Commercial avenue	177.00
35	R. W. and C. J. Long	44 44-100	Lot 43, Walker's Sunny Side sub.	157.32
36	R. W. and C. J. Long	45	Lot 44, Walker's Sunny Side sub.	159.30
37	R. W. and C. J. Long	45	Lot 45, Walker's Sunny Side sub.	159.30
38	J. H. Van Deman	45	Lot 46, Walker's Sunny Side sub.	159.30
39	Citizens' Street R. R. Co.	45	Lot 47 Walker's Sunny Side sub.	159.30
40	Citizens' Street R. R. Co.	45	Lot 48 Walker's Sunny Side sub.	159.30
41	Town of Irvington	50	Lake avenue	177.00
42	James Stevenson	42 91-100	Lot 88, Walker's Sunny Side sub.	151.90
43	Jas. Milligan	42 91-100	Lot 89 Walker's Sunny Side sub.	151.90
44	M. S. McGaughey	42 91-100	Lot 90 Walker's Sunny Side sub.	151.90
45	Town of Irvington	12	Alley west of Lake Ave.	42.48
46	Sarah A. Hibben	40	Lot 53, Pattison's University Place add.	141.60
47	Sarah A. Hibben	40	Lot 54, Pat-ison's University Place add.	141.60
48	Sarah A. Hibben	40	Lot 55, Pattison's University Place add.	141.60
49	Sarah A. Hibben	40	Lot 56 Pattison's University Place add.	141.60
50	Sarah A. Hibben	40	Lot 57 Pattison's University Place add.	141.60
51	Sarah A. Hibben	40	Lot 58, Pattison's University Place add.	141.60
52	Sarah A. Hibben	40	Lot 59, Pattison's University Place add.	141.60
53	Sarah A. Hibben	92 50-100	Lot 60 Pattison's University Place add.	327.45
54	Town of Irvington	73 87-100	Coleman avenue	261.50
55	Sarah J. Pattison	1	Lot 16, Pattison's University Place add.	3.54
56	A. L. Parker	215 90-100	Pt. W. ½ of "¼ of S. W. ¼ sec. 3-15-4	764.29
57	Town of Irvington	60	National avenue	212.40
58	H. U. and J. H. Brown and M. E. Hannah.	666 85-100	Lots 46, 47, 48 and vacated street also part S. E. ¼ of S. E. ¼ sec. 4-15-4.	2360.65
59	A. P. Stanton, trustee	712 17-100	Part S. E. ¼ sec. 4-15-4	2521.08
60	A. P. Stanton, trustee	92 71-100	Part S. E. ¼ sec. 4-15-4	328.19
			Total	18146.57

37 I hereby certify that the above estimate is correct.

JOHN V. COYNER,
Town Civil Engineer.

That said engineer's report was by the board referred to the committee on streets, alleys and contracts, and February 15th, 1899, was fixed as the date for a hearing upon such report.

That on the 31st day of January and on the 7th day of February, 1899, said board caused to be published in the Indianapolis Sentinel a notice that such hearing on such report would be had before the committee on streets, alleys and contracts, on the 15th day of February, 1899.

That on the 7th day of March, 1899, the said board granted an extension of time to enable the contractor to complete said improvements according to specifications and directed the committee on streets, alleys and contracts to procure from the city engineer of Indianapolis an opinion as to what was necessary to complete said improvement, and to employ said city engineer to oversee the completion of said improvement; that on the 25th day of March, 1899, the said committee on streets, alleys and contracts offered a report on such engineer's report, recommending that the board approve such engineer's report; that on the 26th day of April, 1899, B. J. L. Jeup, said engineer of the city of Indianapolis, made to said board a report upon said improvement, which report set out a number of things which should be completed by the contractor, and recommended that after their completion the assessment as made by said Coyner in such engineer's report be allowed; that on the said 26th day of April, 1899, the said board extended to property owners an opportunity to make objection to said improvement; that on the said 26th day of April, 1899, the said committee
38 on streets, alleys and contracts, offered a substitute report on such engineer's report; that said substitute report set out that a hearing had been had on such engineer's report on the 15th day of February, 1899, that said substitute report found that the measurements in such engineer's report and the amounts assessed therein were correct and recommended the passage of an estimate resolution approving and confirming the assessments as made by said town engineer in such engineer's report, which substitute report of the committee was in the words and figures following, to-wit:—

"Your committee on streets, alleys and contracts to whom was referred the estimate roll by the town civil engineer for the construction of a brick pavement in Washington street from Central avenue to Wallace street begs leave to report that a meeting of the committee was held on Feb 15, 1899, at 8 o'clock p. m. in the rooms of the town board pursuant to notice duly given to hear objections, if any, of the property owners affected by said estimate; that questions were raised by Thomas L. Thompson and Charles M. Cross as to the accuracy of the measurement of their respective frontages and that further hearing was accorded them and other citizens with the result that the committee finds from the data at command and supplied by the engineer, that the measurements in the estimate and the amounts assessed are correct. The committee having further satisfied itself that the additional work required by the engineer had been per-

formed by the contractor, now and hereby recommend the passage of the estimate resolution approving and confirming estimates as made by the engineer for the construction of the said pavement. Your committee also recommends that a contract be required of the contractor, W. C. Smith, to put in repair 100 feet of curbing on the north side of Washington street between Pleasant run and (National) Emerson avenue; and 160 feet on the south side of the street west of the Pleasant Run bridge and other portions of curb indicated in Engineer Jeup's report to the board and that $225.00 in cash in addition to guarantee fund, be required for the performance of said work.

Your committee also reports that Susan Davis contends that a private roadway should have been left into her grounds when the curb and roadway were constructed—the committee recommends that the said property owner be guaranteed a driveway at a cost not to exceed the cost of said driveway at the time said roadway was constructed, to-wit:—$24.85.

JESSE SUMMERS,
HILTON U. BROWN,
J. C. BARNHILL, *Com.*

That on such hearing before said committee on streets, alleys and contracts and on the hearing before said board of trustees, no hearing was had upon and no consideration was given, to the question of whether or not the abutting property or any part thereof was specially benefitted in an amount equal to, less than, or in excess of the amounts fixed by the assessments in the said engineer's report; that at no time did said committee or said board consider or determine, or attempt to consider or determine, or to give or have any hearing upon the amount of special benefit to any of the lands or lots abutting upon said improvement; that all the acts and proceedings of said board hereinbefore set out were had and done and that said hearings before said committee and before said board were had and said assessments were made and confirmed upon the theory and belief that the statutes of the State and the said ordinance and resolution of February 23, 1898, established the rule of assessment at the same fixed price per lineal front foot on each side for the whole improvement, and that no change could be made therein by said board; that said committee and said board refused at such hearings to hear or consider any objection to said engineer's report and the assessment therein based upon any inquiry into the amount of special benefit accruing to any abutting lot or parcel of land.

That said substitute report was adopted and that thereupon on the said 26th day of April, 1899, the said board by ordinance accepted said improvement and adopted and approv*ment* such engineer's report and approved and confirmed the assessment set forth in such engineer's report, which approval and confirmation was in the words and figures following, to-wit:—

"Resolved by the board of trustees of the town of Irvington, Indiana.

That the report of the committee on streets, alleys and contracts recommending the approval of the final estimate made by the town civil engineer in favor of William C. Smith, contractor for the improvement of roadway of Washington street from the west property line of Wallace street to the east curb line of Central avenue pursuant to resolution passed on the 23rd day of Feb'y 1898, be and the same is hereby approved.

That the assessments set forth in said final estimate are hereby approved and confirmed, and there *is* hereby assessed against the several lots and parcels of ground as described in said final estimate, the several amounts set opposite and assessed against said several lots and parcels of ground respectively, for and on account of said improvement. The town clerk is hereby directed to place said assessments upon the town tax duplicate, and to charge the same respectively against the several lots and parcels of
41 ground against which they have been so assessed, as follows, to-wit:—ten per cent. for each successive year for ten years, together with interest on the several amounts so assessed at six per cent. per annum. payable semi-annually, calculated from April 26, 1899, the date of the approval of this estimate, until the several amounts fall due. The first ten per cent. of said assessments, with interest on the whole from the date of the approval of this estimate, shall be due and payable on the first Monday in November, 1899. The semi-annual interest on the unpaid balance shall be due and payable thereafter at the dates of the semi-annual payment of town taxes in each year; and on the first Monday in November in each year thereafter, one tenth of the principal of said assessment, together with the semi-annual interest on the unpaid balance, shall be due and payable until all is paid.

Provided however, that the above provision for extending said assessments upon the town tax duplicate and collecting the same successively in annual and semi-annual installments of principal and interest respectively, shall apply only to the owner or owners of said lots or parcels of ground who shall promise and agree in writing filed with the town clerk of said (?) town, that in consideration of having the right to pay his or their assessment or respective assessments in installments, they will not make any objections to the illegality of irregularity as to their respective assessments and will pay the same when due, with interest thereon not exceeding six per cent. as shall by ordinance or resolution of the board be prescribed or required. The said assessments, together with interest thereon, shall from this date be a lien upon the several lots and parcels of
42 ground against which they are assessed respectively to the same extent that taxes are a lien upon such property; and the said assessments when placed upon the town tax duplicate, shall be collected in the same way that town taxes are collected. All said assessments not so extended upon the town tax duplicate, pursuant to the above proviso, shall be at once due and payable, and shall be

collected by precept and sale as provided by law. The proceeds from such assessments as are so placed on the town tax duplicate shall constitute a special fund to be applied to the payment of the costs of the said improvement and of the bonds and certificates to be issued therefor, and for no other purpose.

That all the members of the said board of trustees of said town of Irvington were residents of said town and tax payers thereof; that two members of said board, to-wit: Hilton U. Brown and J. C. Barnhill were the owners of lots abutting upon said improvement, and assessed therefor at the said rate of $3.54 per lineal front foot.

That on the 20th day of May, 1899, the finance committee made a report to the board upon the guarantee and coupon fund, which report showed the amount of the roadway repair guarantee fund to be $3152.12, and of the coupon guarantee fund $1096.48; that said report was adopted; that the said board thereupon by resolution provided for the issuing of improvement bonds for the sum of $13,736.40 on account of a part of said improvement.

That of the improvement of said Washington street from Wallace street to Central avenue a part thereof, to-wit:—a frontage of 801.80 feet on the south side of said Washington street and directly west of Wallace street is outside the corporate limits of the said town of Irvington and outside the jurisdiction of said town board;
43 that said John Moore had knowledge thereof at time of bidding upon said improvement, that said William C. Smith had knowledge thereof at the time he accepted the assignment of the contract for said improvement from said Moore.

That on the 4th day of April, 1898, this defendant commenced an action against the said Town of Irvington and asked for a permanent injunction against said town, restraining said town and its officers, board of trustees and agents, from proceeding in any wise with the continuance or the construction of the improvement described in plaintiff's complaint; that on the 5th day of April, 1898, process in said action was duly served upon the president of said board of trustees of said town; that said action is still undetermined and pending in the superior court of Marion county, Indiana, being cause No. 56585, room 2; that one of the reasons assigned why such injunction should be granted was that said improvement would amount to a confiscation of this defendant's property and was wholly void and without warrant of law.

That all of the foregoing acts of said board of trustees and each and every of said acts, ordinances and proceedings of said board separately, were opposed to and in violation of the constitution and statutes of the State of Indiana, and also opposed to and in violation of section one of the fourteenth amendment to the Constitution of the United States of America, and that said acts, ordinances and proceedings of said board and each and every of said acts, ordinances and proceedings separately, were null, void, invalid and of no effect.

4" Par.

Fourth paragraph. The defendant, Sarah A. Hibben, for her separate and fourth paragraph of answer to plaintiff's complaint says:—

44 That on the 23rd day of February, 1898, the board of trustees of the town of Irvington did by resolution declare the necessity for and by ordinance provide for the making of the street improvements set out and described in plaintiff's complaint; that said ordinance provided that the cost of said improvement (except the proportion thereof occupied by street and alley crossings) should be assessed per lineal front foot against the real estate abutting thereon; that on the 24th day of February and the 3rd day of March, 1898, the said board caused to be published a notice to property owners that on the 21st day of March, 1898, objections might be made to said board to the necessity for such improvements; that on the 24th day of February and on the 3rd and 10th days of March, 1898, said board caused to be published a notice that on the 28th day of March, 1898, the said board would receive proposals for making said improvement of either macadam, brick or asphalt as might be determined after receiving the bids; that said notice provided that the work should be done in accordance with the plans and specifications therefor on file in the office of the engineer of the said town; that on the 7th day of March, 1898, said board adopted specifications for said improvements; and that said specifications provided among other things that said proposals must state the price per lineal foot front on each side, including all items, such amount to be ascertained by dividing the total cost by double the length of the street; that on the 21st day of March, 1898, this plaintiff, together with other property owners did object orally and in writing to said improvements, for the reason that the cost of said improvement would be greatly in excess of the benefit thereof, and filed their said objections with said board; that said objections were disregarded.

45 That on said 28th day of March, 1898, said board received bids as advertised and on the 4th day of April, 1898, said board accepted the bid of one John Moore to make said improvements of brick for the sum of three dollars and fifty-six cents ($3.56) per lineal front foot on each side, and by ordinance directed the making of such improvement; that on the 30th day of April, 1898, said board entered into a written contract with said John Moore to make said improvements for said sum of three dollars and fifty-six cents ($3.56) per lineal front foot on each side of the street, as provided in the ordinance of February 23, 1898, and according to the said plan and specifications.

That said Moore refused to commence work on said contract and on the 22nd day of July, 1898, William C. Smith, who was then — for more than six months prior to that time had been town civil engineer or Irvington resigned as said engineer; that thereupon said

Moore assigned the said contract to said Smith and said town board accepted said assignment and released said Moore.

That on the 31st day of August the said board changed the specifications and reduced the price of said improvements two cents per lineal front foot on each side.

On the 28th day of January, 1899, John V. Coyner, town civil engineer, submitted to said board a final estimate and made a report on said improvement, showing among other things the total cost thereof and the amount of the assessment against each abutting piece of property; that said report made a uniform assessment of three dollars and fifty-four cents ($3.54) per lineal front foot on each side; that on the 31st day of January and on the 7th day of February, 1899, said board caused to be published a notice that on the 15th day of February, 1899, a committee appointed by the said board would hear objections to such engineer's
46 report; that on the 26th day of April, 1899, the said board after extending to property owners an opportunity to make objection to said improvement, did by ordinance finally approve such engineer's report and confirm the assessment against each piece of abutting property, as made in said engineer's report, all in accordance with the said resolution of February 23, 1898; that said assessments were made and confirmed at the uniform rate of three dollars and fifty four cents ($3.54) per lineal front foot; and such board did by such ordinance direct the town clerk to place said assessments upon the town tax duplicate and to charge the same respectively against the several lots and parcels of ground against which they were assessed.

That on such hearing before said committee and on the hearing before said board of trustees no hearing was had upon and no consideration was given to the question of whether or not the abutting property or any part thereof was specially benefited in an amount equal to, less than, or in excess of the amounts fixed by the assessments in the said engineer's report; that at no time did said committee or said board consider or determine or attempt to consider or determine, or to give or have any hearing upon the amount of special benefit of any of the lands or lots abutting upon said improvement; that all the acts and proceedings of said board hereinbefore set out were had and done and that said hearings before said committee and before said board were had and said assessments were made and confirmed upon the theory and belief that the statutes of the State and the said ordinance and resolution of February 23, 1898, established the theory of assessment at the same fixed price per lineal front foot on each side for the whole improvement
47 and that no change could be made therein by said board; that said committee and said board refused at such hearings to hear or consider any objection to the said engineer's report and the assessments therein based upon any inquiry into the amount of special benefit accruing to any lot or parcel of land.

That all the members of the said board of trustees of said town of Irvington were residents of said town and tax payers thereof; that

two members of said board, to-wit:—Hilton U. Brown and J. C. Barnhill were the owners of lots abutting upon said improvement and assessed therefor at the said rate of $3.54 per lineal front foot.

That the total frontage of the defendant's land upon said improvements was 1129.52 feet and that the said town clerk in accordance with the said ordinance placed upon the town tax duplicate an assessment against defendant's said lands of $3.54 per lineal front foot, making a total of $5414.50. Said defendant further says that the said street so improved is of the aggregate length of five thousand, one hundred twenty six and fifteen hundredths (5126.15) feet; that on the east of said improvement said street is improved with macadam for a distance of about 1760 feet to the east line of the said town of Irvington; that on the west of said improvement the said Washington street is wholly unimproved for a distance of about 5115 feet to the improvements in the city of Indianapolis, and that such unimproved portion is much worn and often in bad condition; that the said improved portions of Washington street are a portion out of what is called the National road, which is a public highway extending from beyond the city of Indianapolis on the west through the country *beyond the city of Indianapolis on the west through the country* far to the east of the said town of Irvington; that said highway is much used by
48 the general public for travel and traffic from and to points *each* and west of said town of Irvington, that a considerable portion of the travel along and over said improvement is by all the citizens of Irvington or to or from said town of Irvington; and but a small part of the travel along and over said improvement is to or from the property abutting thereon or by the owners of said abutting property; that a large proportion of the real estate fronting on said improvement is unimproved and is beyond the part of said town of Irvington where real estate is being improved; and is beyond that part of said town where improvements are likely to be made, and that there is no market for said real estate at this time and there are no prospects that it can be sold in the near future for the purpose of being built upon and improved; that the street improvements described in plaintiff's complaint added nothing to the value of a large part of the real estate fronting upon said improvement; that said improvement is of no special benefit or advantage to said defendant or to the other owners of the abutting property along the line thereof; that the said defendant and the other abutting property owners derive no more benefit from such improvement than the other residents of said town and the general public throughout said county of Marion; that of the real estate belonging to this defendant, viz: lots 53, 54, 55, 56, 57, 58, 59 and 60, are unimproved and unoccupied; that there is no sale or market for such lots at this time and there is no probability of there being in the near future any sale or market for said lots or for any of them for improving or building purposes or for any purpose by which said improvement of Washington street would be of any advantage

to or add to the value of said lots or any of them
49 that said improvement does not add to the value of said lots or of any of them; that said lots 53, 54, 55, 56, 57, 58, and 59 were of the value of four hundred dollars each; and that the assessment against said lots is in substantial, to-wit: $141.60 on each lot, excess of the special benefits received or which will be received by said lots; that said lot 60 is of the value of three hundred dollars and that the assessment against said lot 60 is in substantial, to-wit: $327.45, excess of the benefits received or which will be received by said lot; that the land belonging to this defendant and described in plaintiff's complaint as part W. ½ of S. W. ¼ sec. 3–15–4 is an irregular tract of 20.55 acres lying in the northwest part of the corporate limits of said town of Irvington, having a frontage of one thousand, one hundred fifty seven and two hundredths (1157.02) feet on the north side of Washington street and a depth of about 1237 feet; that said real estate is not platted into lots and that there is no market or sale for said tract of land or any part thereof for building purposes, nor is there any prospect that there will be any such market or sale for said real estate or any part thereof in the near future; that the only value of said real estate is for pasturage, and that the ssaid improvements of Washington street are of no special or peculiar advantage or benefit to said tract whatever, and that said improvements add nothing to the value of said tract of 20.55 acres; that said tract was of the value of twenty thousand dollars and that the assessment against said tract is in substantial, to-wit: $4095.85 excess of the special benefit received or which will be received by said tract from said improvement.

That on the 4th day of April, 1898, this defendant com-
50 menced an action against the said Town of Irvington and asked for a permanent injunction against said town, restraining said town and its officers, board of trustees and agents from proceeding in any wise with the continuance or the construction of the improvement described in plaintiff's complaint; that on the 5th day of April, 1898, process in said action was duly served upon the president of said board of trustees of said town; that said action is still undetermined and pending in the superior court of Marion county, Indiana, being cause No. 56585, room 2; that one of the reasons assigned why such injunction should be granted was that said improvement would amount to a confiscation of this defendant's property.

This defendant further alleges that by reason of the acts of said town board of trustees in passing said ordinance declaring the necessity for and providing for said improvement of Washington street and in approving and confirming the engineer's report and the assessments made therein on the 26th day of April, 1899, and by each and every act of said board connected with or relating to the said improvement, the defendant's property is taken without compensation and without due process of law and that all of the said acts of said board and each of said acts is contrary to and in violation of the constitution and laws of the State of Indiana and contrary to and in violation of the Constitution of the United States of America

and particularly of the first section of the fourteenth amendment to the Constitution of the United States of America.

Wherefore, defendant, Sarah A. Hibben, prays that said assessment be declared void and that defendant have judgement for costs.

M. W. HOPKINS,
R. T. MACFALL,
Att'ys for Def't Hibben.

51 "And plaintiff is ruled by the court to reply to said answer."

And afterwards to-wit: on the 2nd day of June, 1900, being the 24th day of the May term, 1900, of the said court, before the same hon. judge, the following proceedings were had herein, viz:

"Comes the defendant, Sarah A. Hibben, by counsel and files her fifth paragraph of answer to the complaint herein as follows:"

Fifth Paragraph of Answer of Defendant Sarah A. Hibben.

STATE OF INDIANA, } ss:
County of Marion, }

In the Superior Court of Marion County, Room 3.

WILLIAM C. SMITH
vs.
SARAH A. HIBBEN, THE FINANCIAL EXCHANGE, JOSEPH A. Pattison, Elwood W. Seamans, and Indiana Bermudez Asphalt Company.

The defendant, Sarah A. Hibben, for her separate fifth paragraph of answer to so much of plaintiff's complaint as seeks to establish and enforce a lien against certain real estate described in the engineer's report and the assessment rolls as 1157.02 feet, being "part W. ½, S. W. ¼, sec. 3-15-4," says:—

That said real estate is described in said engineer's report and the assessment thereon therein made and as approved and confirmed by the board of trustees of said town as follows:—

"*Estimate Roll, North Side.*"

* * * * * * *

No.	Owner's name.	No. of feet.	Description.	Assessment.
36	Sarah A. Hibben	1157.02	Part W. ½, S. W. ¼, sec. 3-15-4	$4095.85."

That neither said engineer's report and the assessment therein, nor any of the proceedings or doings of the engineer of the said town of Irvington or of the board of trustees of said town or of any

committee of said board, contains any other further or more
52 complete description of said real estate.

Wherefore said defendant says that said assessment is invalid and of no effect and prays for judgment.

M. W. HOPKINS,
R. T. MACFALL,
Att'ys for Defendant Sarah A. Hibben.

"And the plaintiff is ruled by the court to reply to said fifth paragraph of answer herein."

And afterwards, to-wit: on the 13th day of October, 1900, being the 12th judicial day of the October term, 1900, of said court, before the same hon. judge, the following proceeding was had herein, viz:

"Comes the plaintiff by counsel and files his separate demurrer to the second, third, fourth and fifth paragraph- of answer of defendant Hibben herein, as follows, viz:"

Demurrer to 2", 3", 4", & 5" Par. of Ans.

STATE OF INDIANA, } ss:
County of Marion, }

In the Superior Court, Room 3.

WILLIAM C. SMITH } No. 58774.
vs.
HIBBEN ET AL. }

Demurrer to answers.

The plaintiff demurs to the second, third, fourth and fifth paragraphs of answers of the defendants in the above entitled cause and to each of said paragraphs of answer separately and for cause of demurrer says, that neither of said paragraphs of answer states facts sufficient to constitute a cause of defense in the above entitled cause.

Wherefore plaintiff demands judgement according to his complaint and all proper relief.

HARVEY, PICKENS, COX & KAHN,
Attorneys for Plaintiff.

And afterwards to-wit: on the 17th day of October, 1900,
53 being the 15th judicial day of the October term, 1900, of said court, before the same hon. judge, the following proceedings were had herein, viz:

Demurrer to 5" Par. Ans. Overruled; Demurrer to 2", 3", & 4" Par. Ans. Sust.

"Come the parties by counsel and the court, being fully advised, in the premises, sustains the plaintiff's demurrer to the second, third and fourth paragraphs of the answer of defendant, Sarah A. Hibben, herein, to which ruling said defendant at the time excepts, and the court being fully advised overrules the plaintiff's demurrer to the fifth paragraph of the answer of said Sarah A. Hibben herein, to which ruling plaintiff, at the time excepts and he is now ruled to reply."

And afterwards, to-wit: on the 8th day of November, 1900, being the fourth judicial day of the November, term, 1900, of said court, the following proceedings were had herein. Comes the defendant, Sarah A. Hibben, and files her cross-complaint against the plaintiff and her co-defendants and process is ordered to issue thereon, returnable 20th of November, 1900."

STATE OF INDIANA, } ss:
County of Marion, }

In the Superior Court of Marion County, Room 3.

WILLIAM C. SMITH *vs.* SARAH A. HIBBEN, THE FINANCIAL Exchange, Joseph A. Pattison, Elwood A. Seamans, Indiana Bermudez Asphalt Company.	No. 58774. Cross Complaint of Sarah A. Hibben.

1*st Par. Cross-Complaint*

First paragraph. The defendant, Sarah A. Hibben, for her first paragraph of cross complaint against the plaintiff, Wiliam C.
54 Smith, and against her co-defendants, The Financial Exchange, Joseph A. Pattison, Elwood W. Seamans and The Indiana Bermudez Asphalt Company says:—

That the street improvement set out and described in plaintiff's complaint was made and the liens therefor sought to be enforced in said complaint were attempted to be created by the board of trustees of the town of Irvington under the authority of and in accordance with the provisions of an act of the General Assembly of the State of Indiana entitled "An act concerning powers and duties of cities and incorporated towns and their common councils and boards of trustees and providing the mode and manner of making street and alley improvements and building sewers, and providing for the mode and manner of enforcing the payment of the costs of street

and alley improvements and building sewers, and permitting cities or incorporated towns to issue street and sewer improvement bonds and repealing all conflicting laws, and declaring an emergency," approved March 8, 1889, being chapter XVIII of the Laws of the State of Indiana passed at the fifty-sixth regular session of the General Assembly, and acts amendatory thereof, said act and such amendatory acts being sections 4288 to 4299, both inclusive, of Burns' Revised Statutes 1894.

That said act and the amendments thereto and each and every section of said act and of said amendments are all and each section separately opposed to and in violation of section one of the fourteenth amendment to the Constitution of the United States and of sections 12 to 21 of the bill of rights and of section 1 of article 10 of the constitution of the State of Indiana and that said sections and each of them are null, void and invalid and of no effect.

55 That the cross complainant is the owner of real estate abutting upon said improvement and having an aggregate frontage thereon of 1529.52 feet; that said real estate is described in plaintiff's complaint and in the assessment roll as lots 53, 54, 55, 56, 57, 58, 59 and 60 in Pattison's University place and also a part of W. ½ of S. W. ¼ sec. 3–15–4, and all more fully described as lots 53, 54, 55, 56, 57, 58, 59 and 60 in Pattison's University Place addition to the town of Irvington, and also a part of the west half of the southwest quarter of section three (3), township fifteen (15) north, range four (4) east, all in Marion county, Indiana; that said real estate was assessed for said improvement at the uniform rate of $3.54 per lineal front foot, making an aggregate assessment of $5414.50; that said assessments is illegal, null and void and a cloud upon cross-complainant's title to said real estate.

That the Financial Exchange, Joseph H. Pattison, Elwood W. Seamans and the Indiana Bermudez Asphalt Company claim some interest in the said assessment and are made parties hereto that they may answer as to such interest.

Wherefore, the cross-complainant prays that the assessments against her real estate may be declared illegal, null and void, and that said assessments be adjudged to be cancelled, and cross-complainant's title to said real estate be quieted, and the plaintiff, William C. Smith and the defendants, The Financial Exchange, Joseph H. Pattison, Elwood W. Seamans and The Indiana Bermudez Asphalt Company, and all persons claiming under or through them, or any of them, be forever enjoined from attempting to collect or enforce said assessment and for all other proper relief.

2" Par. Cross-comp.

Second paragraph. The defendant, Sarah A. Hibben, for her second and further paragraph of cross-complaint against the plaintiff, William H. Smith, and against her co-defendants, The

56 Financial Exchange, Joseph Pattison, Elwood W. Seamans and The Indiana Bermudez Asphalt Company, says:—

That on the 23rd day of February, 1898, the board of trustees of the town of Irvington by resolution and ordinance declared the necessity for and provided for making the street improvement described and set out in plaintiff's complaint; that said resolution and ordinance was in the words and figures following, to-wit:—

"Resolved by the board of trustees of the town of Irvington, Indiana, two thirds of the members of said board concurring:

First. That a necessity exists for the improvement of the roadway of Washington street in the said town from Wallace street to Central avenue.

Second. That the said improvement shall be made in the following manner, to-wit:— * * *

All of the said work to be done to the satisfaction of the town engineer and the said board of trustees and in accordance with the plans and specifications therefor adopted by said board.

Third. The cost of the said improvement (except the proportion thereof occupied by street and alley crossings) shall be assessed per lineal foot against the real estate abutting thereon. * * *

All to be done in accordance with the provisions of an act of the General Assembly of Indiana concerning street improvements, approved March 8, 1889, and the acts amendatory thereof. * * *

Sixth. An emergency exists for the immediate taking effect of this resolution, therefore the same shall be in force from and after its passage."

That on the 24th day of February and the 3rd day of
57 March, 1898, the said board caused to be published a notice to property owners that on the 21st day of March, 1898, objections might be made to said board to the necessity for such improvement; that on the 24th day of February and on the 3rd and 10th days of March, 1898, said board caused to be published a notice that on the 28th day of March, 1898, the said board would receive proposals for making said improvement; that said notice provided that the work should be done according to the said resolution of February 23rd, 1898, and according to the plans and specifications on file in the office of the town engineer.

That on the 7th day of March, 1898, the said board by ordinance approved the specifications for said improvement; that the specifications so approved were the general specifications of the city of Indianapolis for the year 1898, subject to the necessary verbal changes, and that the specifications so approved were placed on file in the office of said town engineer and were the basis of the bids hereinafter mentioned, including the bid finally accepted by said board, and such specifications became a part of the contract under which the plaintiff made the street improvement set out and described in his complaint.

That said specifications provided among other things that upon notice from the town board the contractor should discontinue work during the winter months and place the work in condition to accommodate the public and protect the work; that all work and material must be satisfactory to the engineer and must be approved by

the town board; that "should the engineer require it, the contractor shall at any time during the period of construction or maintenance of the work contracted for, make such openings and to such extent, through any part of said work as the engineer may direct,
58 and he shall make the same good again to the satisfaction of the board;" that during the progress of the work and during a period of seven years from the date of the approval of the assessment roll, the whole work should be at the contractor's risk and he should be responsible for any and all damages to persons or property on account of the work, whether occasioned by rise in the river, floods, back water, caving, settling of tranches or foundations of buildings, or any portion of the improvement; derangement of alignment, defect in surface, foundations or other appurtenances, or otherwise occasioned; that without additional compensation the contractor should make good any such damage to the work and should make good any defect in the workmanship, materials or condition of the work during the said period of seven years; that said contractor should keep said work in repair during the said period of seven years and should make all repairs at such time as directed by the board or the engineer, and that such obligation on the part of the contractor should cover and include all repairs growing out of the imperfection or unsuitability of materials or compositions, too great or too little moisture, all defects of workmanship, extremes of heat or cold, and all other effects of climate, and cover all other excessive deteriorations, viz:—any holes or cracks in said pavement and any defects resulting from the decomposition of the wearing surface or foundation and that the pavement at the expiration of the said period of seven years should be in good condition and present surface so true and even that it should in no way be an obstruction to travel, and have drainage so perfect that water should collect in no place to a depth of more than one-quarter of an inch; that the determination of the character, amount, extent and necessity
59 for repairs should rest entirely with the board and its decision should be final and obligatory upon the contractor and that such determination might extend to the total reconstruction of the whole body of the work; that upon failure of the contractor to so repair or reconstruct, the said board might make such repairs or reconstruction at the expense of said contractor; that said board should retain out of the cost of said improvement a sum equal to 20 cents per square yard as a repair guarantee fund to secure the repair and maintenance of said pavement by the contractor in accordance with the contract for the construction, repair and maintenance thereof; that the contractor should deposit with the said town a sum equal to three per cent. of the total cost of the said improvement as a coupon payment fund to meet the payments on delinquent bonds and coupons issued on this improvement; that the bidder in submitting his bid should state the price per lineal foot on each side, the amount to be ascertained by dividing the total cost of the improvement, including all appurtenances and maintenance for the said period of seven years by double the length of the

street given in the specifications; that the contractor should not assign or transfer the contract or sub-let the work or any part thereof; that the contractor must have an office or agent in the city of Indianapolis during the period of construction and during said period of seven years; that the location of this office or the post office address of the agent must be filed with the board, and notice sent to such office or agent at the address on file in the office of the board should be considered full and sufficient notice under these specifications; that all surplus earth removed by the contractor should be hauled to such streets, alleys or
60 other places as might be directed by the said board and engineer within a distance of 1000 feet and shaped to the satisfaction of the said board and engineer; that the curbing should be under the same guarantee as the street surface; that the board would reserve the right to change the kind of brick to be used in said pavement even after the contract was let; that the estimated length of street to be improved was 5155 lineal feet; that the width to be graded was 42 feet; that the width to be improved was 26 feet; that the estimated amount of gravel concrete was 15892 square yards; that the estimated amount of curb and gutter was 9600 feet and 387 feet round corner curb; that the estimated amount of marginal stone was 10485 feet; that there were five man holes and catch basins and 14 iron inlets; and 10310 feet of drain tile; that the guarantee fund would be estimated upon the area of the pavement from face to face of curbing.

That on the 21st day of March, 1898, this defendant, along with other property owners along the line of said proposed improvement filed with the said board of trustees their written objections to said proposed improvement; that the total frontage of property owners along said proposed improvement was 9266.65 feet; that said owners so objecting owned an aggregate frontage of 6263.28 feet, that in said written objections the objectors asked that neither of the improvements provided for in said ordinance of February 23, 1898, be made for the reason that the probable expense would be largely out of proportion to the value of the abutting property and would in several instances exceed its total value and work a forfeiture of the property, and that any of the proposed kinds of improvement would be of no more value to the property than a less expen-
61 sive improvement.

That said board took no action on said objections and on March 28, 1898, received and opened bids for said improvements; that on the 4th day of April, 1898, said board accepted the bid of one John Moore to make said improvement of brick for the sum of $3.56 per lineal front foot on each side and by ordinance directed the making of said improvement, which ordinance was in the words and figures following, to wit:—

"Resolved by the board of trustees of the town of Irvington, Indiana, two-thirds of the members of said board concurring, That whereas it has heretofore been declared by this board by a resolution passed on the 23rd day of Feb. 1898, that a necessity existed for

the improvement of the roadway of Washington street in the said town from Wallace street to Central avenue and that the same should be graded as therein provided and that upon such grade there should be constructed one of three kinds of improvement therein set out as might be determined by this board upon the openings of bids on each of said kinds.

Now therefore it is hereby resolved by the said board that the said roadway shall be improved by constructing thereon the following improvement, viz:—a brick pavement of paving blocks laid upon a concrete base, with combined curb and gutter composed of sand, cement and crushed granite and along the side of the improvement next to the street car tracks in the center of the roadway shall be placed a marginal curb of stratified limestone, the same being one of the kinds of improvement provided in the said resolution, which shall be constructed in accordance with the provisions of the said resolution passed on the 23rd day of Feb. 1898, and the
62 plans and specifications for such improvement heretofore adopted by this board and resolved further that the bid of John Moore for the construction of the said improvement heretofore received by this board proposing to make the same for $3.56 per lineal front foot on each side by and the same is hereby accepted and the said John Moore shall enter into a formal contract for the performance of the said work and file his bond as provided in the specifications within ten days, and the judiciary committee is directed to prepare said contract.

Resolved further that all the checks received with bids upon the said improvement, except the check received with the bid of John Moore be returned by the treasurer to the persons to whom they belong."

That on April 11th the said board by ordinance provided that the Indiana paving block manufactured at Brazil, Indiana, should be used in making said improvement.

That such further proceedings were had that on the 30th day of April, 1898, the said board entered into and signed a contract with said John Moore and accepted his bond to construct the improvement hereinbefore mentioned and described, which contract and bond were in the words and figures following, to-wit:—

"This agreement, entered into this 18th day of April, 1898, by and between John Moore of the county of Marion and State of Indiana, party of the first part, and the Town of Irvington, State of Indiana, Marion county, party of the second part, under and by virtue of an act of the General Assembly of the State of Indiana entitled "An act concerning powers and duties of cities and incorporated towns and their common councils and board of trustees and providing the mode and manner of making street and alley improvements and
63 buiding sewers and providing for the mode and manner of enforcing the payments of the costs of street and alley improvements and building sewers, and permitting cities or incorporated towns to issue street and sewer improvements bonds" approved March 8, 1898, and acts amendatory thereof.

Witnesseth: That the party of the first part covenants and agrees, etc. * * * all for the sum of three dollars and fifty-six cents ($3.56) per lineal foot on each side of said improvement complete, according to a resolution adopted by the board of trustees of said town on the 23rd day of February, 1898, and the plans, profiles and specifications are made a part hereof as fully and effectually as if copied herein at full length. * * * that for and during the time of the making of said improvement, and the period for which the same is to be maintained and kept in repair by him, he will save the town of Irvington harmless from any and all liability growing out of any injury or damage to property or persons because of any neglect or fault of himself or his agents or employees in the execution of this contract, or because of any neglect or fault of himself or his agents or employees in any matter connected therewith or related thereto, and to pay any judgements with costs, which may be obtained against said town on account of any such injury or damage.

It is mutually understood and agreed that the second party shall be liable to said first party for the contract price of such improvement, whether represented by bonds or assessments, to the extent of the moneys actually received by said town from assessments or bonds growing out of said improvement, and also for the improvement of that part of said street which shall be occupied by the street and alley crossing, and for no more. * * *

64 It is hereby expressly agreed that no assignment of this contract shall be made to any party without the consent of said board of trustees in writing, and any assignment without such consent first had, shall nullify this contract.

It is further agreed that the said town shall not be liable to said first party or his assigns for any delay or loss in the payment of assessment or interest thereon by the property owners who fail or refuse to sign a waiver, availing themselves of the ten year installment plan of payment as provided by law, or for attorney's fees; and that although suits for the collection of such assessments may be brought in the name of said party of the second part, said town shall not be or be held liable for the cost or expense of such suits, or for any failure to recover the amount or amounts therein claimed to be due.

The party of the first part hereby consents that the said town shall retain out of the total amount shown by the final estimate to be due from the said town on account of street and alley crossings, a sum equal to twenty cents per square yard for each square yard of pavement constructed, which sum shall be and constitute a repair guarantee fund in the hands of said town for the purpose of securing the repair and maintenance of said pavement by the contractor to the satisfaction of the board.

In the event the sum above specified shall exceed the amount due said contractor from said town on account of street and alley crossings, then said contractor shall deposit a sum sufficient to make said guarantee fund equal to twenty cents per square yard for each square of improvement constructed. This guarantee fund, or only such

part of it as shall remain in the hands of the town unexpended as above provided at the expiration of said guarantee period,
65 shall then be paid to the contractor with interest at the rate of five per cent. per annum.

Provided: that no interest shall be paid upon any part of said fund which the town may have been compelled to expend for repair at any time within said guarantee period of seven years.

Provided: also that no interest shall be paid until the expiration of said guarantee period. Interest however may be paid annually on order of the board if the roadway is properly maintained by the party of the first part.

The contractor, party of the first part, hereby contracts and agrees to deposit with the town upon the certificate of the engineer showing the total cost of the improvement, a sum equal to three per cent. of said total cost, which sum shall be and constitute a fund in the control of the town's treasurer to be known as the coupon payment fund, which fund shall be used by said treasurer to meet the payment of all delinquent bonds and coupons issued by the town upon their improvement.

The moneys taken from such fund for the purpose herein named shall be replaced and paid back into the fund as rapidly as such delinquencies are paid into the treasury. Said treasurer shall issue to the party of the first part a certificate of the amount retained, which shall not bear interest and shall be payable to the contractor or his order by the treasurer of said town two (2) years after the date of its issue.

It is hereby agreed that neither of said funds above specified shall at any time during the period for which they are retained be decreased by the said party of the first part.

In the event the pavement during the guarantee period
66 is not in good condition and repair to the satisfaction of the board of trustees of said town and if the first party shall refuse or neglect to put the same in repair to the satisfaction of said board on fifteen (15) days' notice, said board may cause the same to be done and pay for the same out of the guarantee fund above provided for, and said sum or sums so paid for such repairs out of said guarantee fund shall constitute and be considered a payment by the said town upon the amount due from it to the contractor on account of the cost of street and alley crossings, and the town shall retain the balance of said fund, if any, in said repair guarantee fund for use in future repairs. Should the cost of such repairs made by order of the board of trustees exceed the amount retained as above provided, or the amount of said repair fund remaining on hand at the time of making such repairs, the party of the first part shall be held responsible to the town for the amount of such excess, and such excess shall be collected by suit from the contractor. * * *

To each of the conditions and stipulations of this contract, the undersigned, John Moore, party of the first part, and Town of Irvington, party of the second part, each binds himself and itself and their successors and assigns.

In witness whereof, we, the foregoing named parties, hereunto set our hands, this 18th day of April, 1898.

JOHN MOORE.
TOWN OF IRVINGTON.
HILTON U. BROWN,
President Board of Trustees.
C. B. CLARK, *Clerk.*

Bond.

Know all men by these presents that I, John Moore, as principal and Joseph T. Gest, Daniel Lesley and George H. McCaslin, of
67 the county of Marion and State of Indiana, as sureties, are held and firmly bound to the Town of Irvington, Indiana, in the sum of eighteen thousand, three hundred and fifty dollars ($18,350) for the payment of which well and truly to be made we jointly and severally bind ourselves our heirs, executors, administrators and assigns firmly by these presents.

The conditions of the above obligation are such that if the above named John Moore shall faithfully comply with the foregoing contract made and entered into this 18th day of April, 1898, with the town of Irvington, Indiana, and shall fulfill all the conditions and stipulations therein contained, according to the true intent and meaning thereof, in all respects, then this obligation to be void, otherwise to be and remain in full force and virtue in law. In the event the said town shall extend the time for the completion of said work, such extension shall not in any way release the sureties on this bond.

This shall be a construction bond, and the sureties to the same shall not be held responsible for the maintenance and repair of the pavement after it has been accepted by the second party, but such sureties shall be held responsible for the faithful compliance with all the other conditions and restrictions set out in the contract.

Witness our hands and seals the day and year last above written.

JOHN MOORE. [SEAL.]
JOSEPH T. GEST. [SEAL.]
DANIEL LESLEY. [SEAL.]
GEO. H. McCASLIN. [SEAL.]

That on July 20th, 1898, John Moore notified the board that he would not proceed with the work and thereupon he made an
68 agreement with the plaintiff, William C. Smith, who for more than six months prior to that time had been the town civil engineer, to assign said contract to said Smith; that thereafter and on the 22nd day of July, 1898, the said Smith offered to said board his resignation as such engineer, which resignation was accepted; that on the same day said John Moore assigned and transferred his said contract to the said Smith; that on the same day the said board

by resolution approved of and accepted said assignment and released said John Moore from all liability on his said contract and bond, which resolution was in the words and figures following, to-wit:—

"Whereas the board of trustees of the town of Irvington passed a declaratory resolution for the improvement of Washington street on the 23rd day of February, advertising for the reception of bids on the 28th day of March, 1898, and

Whereas, at said date of receiving bids said board was restrained by the superior court on application of one Hay, a non-resident, supported by Harold Hibben, a non-resident. That thereupon said board received said bids and subsequently on April 13, 1898, said superior court held said resolution good, valid and legal and held in all things in favor of said board and thereupon said Hay prayed an appeal to the supreme court, said appeal being dismissed by said court in due time. In the meantime the said Hibben, non-resident, filed before the Hon. Judge L. M. Harvey, of the superior court, a like suit, in fact a duplicate of the Hay case, except as to name of plaintiff, and

Whereas, this board awarded the contract to John Moore for the improvement of said street with brick on his bid of $3.56 per lineal foot on each side, and

Whereas said Moore entered into the execution of said contract and bond on the 18th day of April, 1898, and

69 Whereas on the 20th day of July, 1898, said Moore served notice formally upon said board that he was unable to fulfill his contract and was ready and willing to assign the same to any one acceptable to said board, and

Whereas said Moore by written consent of said board, having assigned said contract and matters and things thereunder to William C. Smith, which said assignment is in the words and figures as follows, to-wit:— * * *

Therefore, be it resolved by the board of trustees of the town of Irvington, Indiana, that the said assignment is hereby accepted, ratified and approved and that William C. Smith is the recognized contractor for the construction of said street under said contract and that the said Moore by virtue thereof is hereby released from all obligation thereunder and his bond is hereby cancelled.

Further, be it resolved that the said William C. Smith be required to file with said board a bond in the sum of $18,350 within a reasonable time from the adoption of these resolutions and shall place on file an indemnifying bond that he will carry out the provisions of this resolution, and in all respects complete the work according to plans and specifications adopted by the board."

That the Harold B. Hibben named in the foregoing resolution is the son of and business manager for the cross-complainant, Sarah A. Hibben, and the suit mentioned in said resolution was filed by and in the name of this cross-complainant and not by and in the name of said Harold B. Hibben.

That thereupon said William C. Smith accepted said assignment and proceeded with the construction of the improvement; that af-

terwards during the construction of said improvement the said board employed said Smith to do the work of a civil engineer for said town; that on August 10, 1898, the said board employed
70 John V. Coyner as town civil engineer for the balance of the year 1898; that on the 31st day of August, 1898, the board directed the contractor to leave the drain tile out of the improvement and allow therefor a rebate of two cents per lineal front foot on each side.

That on the 28th day of January, 1899, the town civil engineer submitted to the said town board the final estimate of the total cost of said improvement and at the same time made to said board a report upon said improvement, which report apportioned the entire cost of such improvement against all the abutting property on the uniform basis of $3.54 per lineal front foot on each side, which report was in the words and figures following to-wit:—

"INDIANAPOLIS, INDIANA, *Jan.* 26, 1899.

To the town board of Irvington.

GENTLEMEN: I beg to submit to you for your consideration, the assessment rolls for the improving of Washington street from Central avenue to Wallace street as per Mr. W. C. Smith's contract.

This is not to be considered as an acceptance of the work, as there are several things to be done by the contractor before the contract is completed. Some of these things can be done at this time of year and are being pushed as fast as the weather will permit, but others must lay over until spring and settled weather, when everything can be completed and a final inspection made before the improvement is accepted.

I may mention here that item No. 60 on sheet 2 south side is not incorporated within the town.

I also submit the extra for paving done by the contractor, Mr. Smith. This extra was caused by the changing of the tracks
71 from double to single at the curve of Washington Street and Central Avenue intersection. The contractor was compelled to change some of the marginal curb that had been placed in position as originally intended and the trenches were excavated for the remainder before I was notified of any change.

I consider the price, 25c. per square foot, a reasonable and just price for the same—not counting the delay and inconvenience caused by the above change of tracks.

The amount of extra surface paved—1024 8/10 square feet at 25c. per square foot, equals $256 20/100—which I submit for your consideration.

Respectfully,

JOHN V. COYNER.

Irvington, April 26, 1899.

INDIANAPOLIS, IND., *Jan'y 26th*, 1899.

To the town board of Irvington.

GENTLEMEN: In compliance with section 45 of the general specifications, I submit the following:

Total square yards of improved surface, including the extra work at east end..... $36,549 36/100

Respectfully, JOHN V. COYNER.

April 26, 1899.

Estimate Roll, North Side.

IRVINGTON, IND., *Jan'y 28th*, 1899.

To the town board of Irvington.

GENTLEMEN: I herewith report an estimate roll for grading and paving with brick Washington street from Central avenue to Wallace street based upon the terms of the contract of William C. Smith, contractor for said work.

Total length frontage of improvement 5126 15/100 feet.

72 Average cost per lineal front foot $3.54. Total cost of improvement $18,146 57/100.

Owner's name.	No. of feet.	Description.	Assessment.
* * * *	* *	* * * * *	* *
36 Sarah A. Hibben.....	1157 2-100	Part W. ½ S. W. ¼ sec. 3-15-4.....	$4095.85
37 Town of Irvington.....	45	National avenue.....	159.30
38 H. U. Brown and A. H. Hannah.	353 10-100	Part E. ½ S. E. ¼ sec. 4-15-4.....	1249.97
* * * *	* *	* * * * *	* *

Estimate Roll, South Side.

8 J. C. and M. Barnhill	69	Lot 3 Thompson's sub..	212 40
* * * *	* *	* * * * *	* *
46 Sarah A Hibben	40	Lot 53 Pattison's University Place add	141.60
47 Sarah A. Hibben	40	Lot 54, Pattison's University Place add.....	141.60
48 Sarah A. Hibben	40	Lot 55, Pattison's University Place add.....	141.60
49 Sarah A. Hibben	40	Lot 56, Pattison's University Place add.....	141.60
50 Sarah A. Hibben	40	Lot 57, Pattison's University Place add.....	141.60
51 Sarah A. Hibben	40	Lot 58, Pattison's University Place add	141.60
52 Sarah A. Hibben	40	Lot 59, Pattison's University Place add.....	141.60
53 Sarah A. Hibben	92 50-100	Lot 60 Pattison's University Place add.....	327.45
* * * *	* *	* * * * *	* *
58 H. U. and J. H. Brown and M. E. Hannah.	606 85-100	Lots 46, 47, 48 and vacated street, also part S. E. ¼ of S. E. ¼ sec. 4-15-4.	2360.65
59 A. P. Stanton, trustee.....	712 17-100	Part S. E. ¼, sec. 4-15-4	2521.08
60 A. P. Stanton, trustee.....	92 74-100	Part S. E. ¼, sec. 4-15-4.....	328.19
* * * *	* *	* * * * *	* *

I hereby certify that the above estimate is correct.

JOHN V. COYNER,
Town Civil Engineer.

The said engineer's report was by the said board referred to the committee on streets, alleys and contracts, and February 15, 1899, was fixed as the date for a hearing upon such report before said committee, notice of which hearing was given by publication.

That on the 7th day of March, 1899, the said board granted an extension of time to enable the contractor to complete
73 said improvement according to the specifications and directed the committee on streets, alleys and contracts to procure from the city engineer of Indianapolis an opinion as to what was necessary to complete said improvement, and to employ said city engineer to oversee the completion of said improvement; that on the 25th day of March, 1899, the said committee on streets, alleys and contracts offered a report on such engineer's report, recommending that the board approve such engineer's report; that on the 26th day of April, 1899, B. J. L. Jeup, such engineer of the city of Indianapolis, made to said board a report upon said improvement which report set out a number of things which should be completed by the contractor, and recommended that after their completion the assessments made by said Coyner in such engineer's report be allowed; that on the 26th day of April, 1899, the said board extended to property owners an opportunity to make objections to said improvement; that on said 26th day of April, 1899, the said committee on streets alleys and contracts, offered a substitute report on such engineer's report; that said substitute report set out that a hearing had been had on such engineer's report on the 15th day of February, 1899; that said substitute report found that the measurements in such engineer's report and the amounts assessed therein were correct and recommended the passage of an estimate resolution approving and confirming the assessments as made by said town engineer in such engineer's report, which substitute report of the committee was in the words and figures following, to-wit:—

"Your committee on streets, alleys and contracts to whom was referred the estimate roll by the town civil engineer for the construction of a brick pavement in Washington street from
74 Central avenue to Wallace street begs leave to report that a meeting of the committee was held on February 15, 1899, at 8 o'clock p. m. in the rooms of the town board pursuant to notice duly given to hear objections, if any, of the property owners affected by said estimate; that questions were raised by Thomas L. Thompson and Charles M. Cross as to the accuracy of the measurement of their respective frontages and that further hearing was accorded them and other citizens with the result that the committee finds from the data at command and supplied by the engineer that the measurements in the estimate and the amounts assessed are correct. The committee having further satisfied itself that the additional work required by the engineer has been performed by the contractor, now and hereby recommend the passage of the estimate resolution approving and confirming estimates as made by the engineer for the construction of the said pavement. Your committee also recommends that a contract be required of the contractor, W. C. Smith, to put in repair 100 feet of curbing on the north side of Washington street between Pleasant run and (National) Emerson

avenue; and 160 feet on the south side of the street west of the Pleasant Run bridge and other portions of curb indicated in engineer Jeup's report to the board and that $225.00 in cash additional to guarantee fund, be required for the performance of said work.

Your committee also reports that Susan Davis contends that a private roadway should have been left into her grounds when the curb and roadway were constructed—the committee recommends that the said property owner be guaranteed a driveway at a cost not to exceed the cost of said driveway at the time said roadway was constructed, to-wit: $24.85.

JESSE SUMMERS,
HILTON U. BROWN,
J. C. BARNHILL,
Com."

75 That on such hearing before said committee on streets, alleys and contracts and on the hearing before said board of trustees, no hearing was had upon and no consideration was given to the question whether or not the abutting property or any part thereof was specially benefitted in an amount equal to, less than, or in excess of the amounts fixed by the assessments in the said engineer's report; that at no time did said committee or said board consider or determine, or attempt to consider or determine, or to give or have any hearing upon the amount of special benefit to any of the lands or lots abutting upon said improvement; that all the acts and proceedings of said board hereinbefore set out were had and done, and that said hearing before said committee and before said board were had and said assessments were made and confirmed upon the theory and belief on the part of said board and of the members thereof that the statutes of the State and the said ordinance and resolution of February 23, 1898, and the subsequent ordinances of said board, and the contract for said improvement, established the rule of assessments at the same fixed price per lineal front foot on each side for the whole improvement, and that no change could be made therein by said board; that said committee and said board refused at such hearings to hear or consider any objection to said engineer's report and the assessments therein, based upon any inquiry into the amount of special benefit accruing to any abutting lot or parcel of land.

That said substitute report was adopted and that thereupon on the said 26th day of April, 1899, the said board by ordinance accepted said improvement and adopted and approved such engineer's report and approved and confirmed the assessments set forth
76 in such engineer's report which approval and confirmation was in the words and figures following, to-wit:

"Resolved by the board of trustees of the town of Irvington Indiana.

That the report of the committee on streets, alleys and contracts recommending the approval of the final estimate made by the town civil engineer in favor of William C. Smith, contractor for the im-

provement of roadway of Washington street from the west property line of Wallace street to the east curb line of Central avenue pursuant to resolution passed on the 23d day of Feb'y 1898, be and the same is hereby approved.

That the assessments set forth in said final estimate are hereby approved and confirmed, and there is hereby assessed against the several lots and parcels of ground as described in said final estimate, the several amounts set opposite and assessed against said several lots and parcels of ground respectively, for and on account of said improvement. The town clerk is hereby directed to place said assessments upon the town tax duplicate, and to charge the same respectively against the several lots and parcels of ground against which they have been so assessed, as follow-, to-wit: * * * The said assessments, together with interest thereon, shall from this date be a lien upon the several lots and parcels of ground against which they are assessed respectively to the same extent that taxes are a lien upon such property; and the said assessments when placed upon the town tax duplicate, shall be collected in the same way that town taxes are collected. All said assessments not so extended upon the town tax duplicate, pursuant to the above proviso, shall be at once due and payable, and shall be collected by
77 precept and sale as provided by law. The proceeds from such assessments as are so placed on the town tax duplicate shall constitute a special fund to be applied to the payment of the costs of the said improvement and of the bonds and certificates to be issued therefor, and for no other purpose."

That all the members of the said board of trustees of said town of Irvington were residents of said town and tax payers thereof; that two members of said board, to-wit:—Hilton U. Brown and J. C. Barnhill, were the owners of lots abutting upon said improvement, and assessed therefor at the said rate of $3.54 per lineal front foot, and by reason of such interest were not competent to fix and determine the amount of actual special benefits accruing to the real estate abutting upon such improvement.

That said board retained of the contract price of said improvement the sum of $3152.12 on account of the roadway repair guarantee fund and the further sum of $1096.48 on account of the coupon guarantee fund.

That the said improvement is not of special and peculiar benefit to cross-complainant's real estate abutting upon said described improvement.

That of the improvement of said Washington street from Wallace street to Central avenue, a part thereof, to-wit:—a frontage of 801.80 feet on the south side of said Washington street and directly east of the intersection of said Washington and Wallace streets is outside the corporate limits of the said town of Irvington and outside the jurisdiction of said town board; and that said John Moore had knowledge thereof at the time of bidding upon said improvement and that said William C. Smith had knowledge thereof at the time

he accepted the assignment of the contract for said improvement from said Moore.

78 That on the 4th day of April, 1898, this cross-complainant commenced an action against the said town of Irvington and asked for a permanent injunction against said town, restraining said town and its officers, board of trustees and agents from proceeding in any wise with the continuance or the construction of the improvement described in plaintiff's complaint; that on the 5th day of April, 1898, process in said action was duly served upon the president of said board of trustees of said town, that said action is still undetermined and pending in the superior court of Marion county, Indiana, being cause No. 56585 room 2; that one of the reasons assigned why such injunction should be granted was that said improvement would amount to a confiscation of cross-complainant's property and was wholly void and without warrant of law.

That all of the foregoing acts of said board of trustees and each and every of said acts, ordinances and proceedings of said board separately were opposed to and in violation of the constitution and statutes of the State of Indiana, and also opposed to and in violation of section one of the fourteenth amendment to the Constitution of the United States, and that said acts, ordinances and proceedings of said board, and each and every of said acts, ordinances and proceedings separately were null, void, invalid and of no effect.

That the cross-complainant is the owner of real estate abutting upon said improvement and having an aggregate frontage thereon of 1529.52 feet; that said real estate is described in plaintiff's complaint and in the assessment roll as lots 53, 54, 55, 56, 57, 58, 59 and 60 in Pattison's University place and also a part of W. ½ of S. W. ¼ sec. 3–15–4, and more fully described as lots 53, 54, 55, 56, 57,

78½ 58, 59 and 60 in Pattison's University Place addition to the town of Irvington, and also a part of the west half of the southwest quarter of section three (3) township fifteen (15) north, range four (4) east, all in Marion county, Indiana; that said real estate was assessed for said improvement at the uniform rate of $3.54 per lineal front foot, making an aggregate assessment of $5414.50 that said assessments is illegal, null and void and a cloud upon cross-complainant's title to said real estate.

That the Financial Exchange, Joseph H. Pattison, Elwood W. Seamans and the Indiana Bermudez Asphalt Company claim some interest in the said assessment and are made parties hereto that they may answer as to such interest.

Wherefore the cross complainant prays that the assessments against her said real estate may be declared illegal, null and void, and that said assessments be adjudged to be cancelled, and cross-complainant's title to said real estate be quieted and the plaintiff, William C. Smith, and the defendants, The Financial Exchange, Joseph H. Pattison, Elwood W. Seamans and The Indiana Bermudez Asphalt Company, and all persons claiming under or through them or any of them, be forever enjoined from attempting to collect or enforce said assessment and for all other proper relief.

3" Par. Cross-comp.

Third paragraph. The defendant, Sarah A. Hibben, for her third paragraph of cross-complaint against the plaintiff, William C. Smith, and against her co-defendants, The Financial Exchange, Joseph A. Pattison, Elwood W. Seamans and The Indiana Bermudez Asphalt Company, says:—

That on the 23rd day of February, 1898, the board of trustees of the town of Irvington did by resolution declare the necessity for and by ordinance provide for the making of the street improvements set out and described in plaintiff's complaint; that
79 said ordinance provided that the cost of said improvement except the proportion thereof occupied by street and alley crossings, should be assessed per lineal front foot against the real estate abutting thereon; that said board gave notice to property owners by publication that on the 21st day of March, 1898, objection might be made to said board to the necessity for such improvement; that said board also gave notice by publication that on the 28th day of March, 1898, the said board would receive proposals for making said improvement of either macadam, brick or asphalt as might be determined after receiving the bids; that said notice provided that the work should be done in accordance with the plans and specifications therefor on file in the office of the engineer of the said town; that on the 7th day of March, 1898, the said board adopted specifications for said improvements; that said specifications provided among other things that said proposal must state the price per lineal foot front on each side, including all items, such amount to be ascertained by dividing the total cost by double the length of the street; that on said 21st day of March, 1898, this plaintiff together with other property owners did object orally and in writing to said improvements, for the reason that the cost of said improvements would be greatly in excess of the benefit thereof, and filed their said objections with said board; that said objections were disregarded.

That said board received bids as advertised and on April 4th, 1898, it accepted the bid of one John Moore to make said improvement of brick for the sum of $3.56 per lineal front foot on each side, and by ordinance directed the making of such improvement; that on the 30th day of April, said board entered into a written contract with said Moore to make said improvement for said sum of
80 $3.56 per lineal front foot on each side of the street, all as provided in the ordinance of February 23, 1898, and according to said plans and specifications; said contract also provided that said town of Irvington should be liable to said Moore "for the contract price of such improvement, whether represented by bonds or assessments, to the extent of the moneys actually received by said town from assessments or bonds growing out of said improvement, and also for the improvement of that part of said street which shall be occupied by the street and alley crossing, and for no more."

That on the 4th day of April, 1898, this cross-complainant commenced an action against the said town of Irvington, and asked for a permanent injunction against said town, restraining said town and its officers, board of trustees and agents from proceeding in any wise with the continuance or the construction of the improvement described in plaintiff's complaint; that on the 5th day of April, 1898, process in said action was duly served upon the president of said board of trustees of said town, that said action is still undetermined and pending in the superior court of Marion county, Indiana, being cause No. 56,585, room 2; that one of the reasons assigned why such injunction should be granted was that said improvement would amount to a confiscation of cross complainant's property, and was wholly void and without warrant of law.

That by reason of the above and other suits the said Moore refused to commence work on said contract and on the 22nd day of July, 1898, the plaintiff, William C. Smith, who was then and for more than six months prior to that time had been town civil engineer of Irvington, resigned as such engineer; that thereupon said Moore assigned the said contract to said Smith and said
81 town board accepted said assignment and released said Moore.

That on the 28th day of January, 1899, John V. Coyner as town civil engineer, submitted to said board a final estimate and made a report on said improvement, showing among other things the total cost thereof and the amount of the assessment against each abutting piece of property; that said report made a uniform assessment of $3.54 per lineal front foot on each side; that said board gave notice by publication that on the 15th day of February, 1899, a committee appointed by the said board would hear objections to such engineer's report; that on the 26th day of April, 1899, the said board after extending to property owners an opportunity to make objections to the said improvement in Washington street did by ordinance finally approve such engineer's report and confirm the assessment against each piece of abutting property, as made in said engineer's report, all in accordance with said resolution of February 23, 1898; that said assessments were made and confirmed at the uniform rate of $3.54 per lineal front foot; and such board did by such ordinance direct the town clerk to place said assessments upon the town tax duplicate and to charge the same respectively against the several lots and parcels of ground against which they were assessed; that said ordinance provided that all assessments not extended for payment in annual installments should be at once due and payable and should be collected by precept and sale as provided by law.

That on such hearing before said committee and on the hearing before said board of trustees no hearing was had upon and no consideration was given to the question of whether or not the abutting property or any part thereof was specially benefitted in an amount equal to, less than or in excess of the amounts fixed by the
82 assessments in the said engineer's report; that at no time did said committee or said board consider or determine or attempt

to consider or determine, or to give or have any hearing upon the amount of special benefits to any of the lands or to lots abutting upon said improvement; that all the acts and proceedings of said board hereinbefore set out were had and done and that said hearings before said committee and before said board were had and said assessments were made and confirmed upon the theory and belief that the statutes of the State and the said ordinance and resolution of February 23, 1898, and the subsequent ordinances of said board and the contract for said improvement, established the rule of assessment at the same fixed price per lineal front foot on each side of $3.54 for the whole improvement and that no change or alteration therein could be made by the board, that said committee and said board refused at such hearing to hear or consider any objection, or any evidence in support of any objection to said engineer's report and the assessments therein, based upon any inquiry into the amount of special benefit accruing to any lot or parcel of land.

That all the members of the said board of trustees of said town of Irvington were residents of said town and tax payers thereof; that two members of said board to-wit:—Hilton U. Brown and J. C. Barnhill were the owners of lots abutting upon said improvement and assessed therefor at the said rate of $3.54 per lineal front foot, and by reason of such interest were not competent to fix and determine the amount of actual special benefits accuring to the real estate abutting upon such improvement.

That the total frontage of the cross-complainant's land upon said improvement was 1529.52 feet and that the said town clerk
83 in accordance with said ordinance placed upon the town tax duplicate an assessment against cross-complainant's said land of $3.54 per lineal front foot, making a total assessment of $5414.50. Said cross-complainant further says that the said contract so improved is of the aggregate length of five thousand, one hundred and twenty-six and fifteen hundredths (5126.15) feet; that on the east of said improvement said street is improved with macadam for a distance of about 1760 feet to the east line of said town of Irvington; that on the west side of said improvement the said Washington street is wholly unimproved for a distance of about 5115 feet to the improvements in the city of Indianapolis, and that such unimproved portion is much worn and often in bad condition; that the improved portion of Washington street is a portion out of what is known as the National road, which is a public highway extending from beyond the city of Indianapolis on the west through the country far to the east of said town of Irvington; that said highway is much used by the general public for travel and traffic from and to points east and west of said town of Irvington and that a considerable portion of the travel along and over said improvement is by all the citizens of Irvington in going to and from the said town of Irvington; that but a small part of the travel over and along said improvement is to or from the property abutting thereon or by the owners thereof, that a large proportion of the real estate fronting on said improvement is unimproved, and is beyond the part of said town of

Irvington where real estate is being improved; and is beyond that part of said town where improvements are likely to be made and that there is no market for said real estate at this time and there are no prospects that it can be sold in the near future for the purpose of being built upon and improved;
84 that the street improvements described in plaintiff's complaint added nothing to the value of a large and the greater part of the real estate fronting upon said improvement; that said improvement is of no special benefit or advantage to said cross-complainant or to the other owners of the abutting property along the line thereof; that the said cross-complainant and the other owners of abutting property derived no more benefit from such improvement than the other residents and property owners of said town, and the general public throughout said county of Marion, that of the real estate belonging to this cross-complainant and described in plaintiff's complaint as follows, to-wit:—Lots 53, 54, 55, 56, 57, 58, 59 and 60 in Pattison's University place, and more fully described as lots 53, 54, 55, 56, 57, 58, 59 and 60 in Pattison's University Place addition to the town of Irvington, Marion county, Indiana, are unimproved and unoccupied, that there is no sale or market for such lots at this time and there is no probability of there being in the near future any sale or market for said lots or any of them for improving or building purposes or for any purpose by which said improvement of Washington street would be of any advantage to or add to the value of said lots or any of them; that said improvement does not add to the value of said lots or of any of them; that said lots 53, 54, 55, 56, 57, 58 and 59 are of the value of $400.00 each; that the assessment against each of said lots is in substantial, to-wit:—$141.60, excess of the benefits received or which will be received by said lots, that said lot 60 is of the value of $300. and that the assessment against said lot 60 is in substantial, to-wit:—$327.45 excess of the benefits received or which will be received by said lot; that the land belonging to cross-complainant
85 and described in plaintiff's complaint as part W. ½ of S. W. ¼ sec. 3–15–4, and more fully described as a part of the west half of the south west quarter of section three (3), township fifteen (15) north, range four (4) east in Marion county, Indiana, is an irregular tract of 20.55 acres lying in the northwest part of the corporate limits of said town of Irvington, having a frontage of 1157.02 feet on the north side of Washington street and a depth of about 1237 feet; that said real estate is not platted into lots and that there is no market or sale for said tract of land or any part thereof for building purposes, nor is there any prospect that there will be any such market or sale for said real estate or any part thereof in the near future; that the only value of said real estate is for pasturage, and that the said improvements of Washington street are on no special or peculiar advantage or benefit to said tract whatever, and that said improvements add nothing to the value of said tract of 20.55 acres; that said tract was of the value of twenty thousand dollars, and that the assessment against said tract is in

substantial, to-wit:—$4095.84, excess of the benefits received or which will be received by said tract or any part thereof from said improvement.

The cross-complainant further alleges that by reason of the acts of said town board of trustees in passing said ordinances declaring the necessity for and providing for said improvement of Washington street and contracting therefor; and approving and confirming the engineer's report and the assessments made thereon on the 26th day of April, 1899, and by each and every act of said board connected with or relating to the said improvement, the defendant's prop-
86 erty is taken without compensation and without due process of law, and that all and each of the acts of said board is contrary to and in violation of the constitution and laws of the State of Indiana and contrary to and in violation of the Constitution of the United States and particularly of the first section of the fourteenth amendment to the Constitution and the assessment set out and described in plaintiff's complaint are illegal, null and void and are a cloud upon cross complainant's title to her said property.

That the Financial Exchange, Joseph H. Pattison, Elwood W. Seamans, and the Indiana Bermudez Asphalt Company claim some interest in the said assessments and are made parties hereto that they may answer as to such interest.

Wherefore the cross-complainant prays that the assessments against her said property may be declared illegal null and void, and that said assessments be adjudged to be cancelled and cross complainant's title to said real estate be quieted and the plaintiff, William C. Smith, and the defendants, The Financial Exchange, Joseph H. Pattison, Elwood W. Seamans and The Indiana Bermudez Asphalt Company, and all persons claiming under or through them or any of them, be forever enjoined from attempting to collect or enforce said assessment, and for all other proper relief.

4" Par. X Comp.

Fourth paragraph. The defendant, Sarah A. Hibben, for her fourth and further paragraph of cross-complaint against the plaintiff, William H. Smith and against her co-defendants The Financial Exchange, Joseph Pattison, Elwood W. Seamans and the Indiana Bermudez Asphalt Company, says, that she is the owner of real estate abutting upon said improvement and having an aggregate frontage thereon of 1157.02 feet and described in plaintiff's complaint and in the assessment roll as "part W. ½ S. W. ¼ sec. 3–15–4." That
87 said real estate was assessed for said improvement at the uniform rate of $3.54 per lineal front foot making an aggregate assessment of $4095.85.

That the description of said real estate in the engineer's report and in the assessment therein made and in the assessment as approved and confirmed by the board of trustees of said town is as follows:

"*Estimated Roll, North Side.*"

* * * * * * *

No.	Owner's name.	No. of feet.	Description.	Assessment.
36	Sarah A. Hibben	1157.02	Part W. ½ S. W. ¼ sec. 3-15-4	$4095.85

That neither said engineer's report nor the assessment therein nor any of the proceedings or doings of the engineer of the said town of Irvington or of the board of trustees of said town or of any committee of said board contains any further or more complete description of said real estate.

That said assessment therein contained is illegal, null and void and a cloud upon cross-complainant's title to said real estate.

That the financial exchange, Joseph H. Pattison, Elwood W. Seamans and the Indiana Bermudez Asphalt Company claim some interest in the said assessment and are made parties hereto that they may answer as to such interest.

Wherefore, the cross-complainant prays that the assessment against her said property may be declared illegal null and void and that said assessment be adjudged to be cancelled and cross-complainant's title to said real estate be quieted and the plaintiff, William C. Smith, and the defendants, The Financial Exchange, Joseph H. Pattison, Elwood W. Seamans and the Indiana Bermudez Asphalt Company and all persons claiming under or through them or any of
88 them, be forever enjoined from attempting to collect or enforce said assessment and for all other proper relief.

MURAT W. HOPKINS,
RUSSELL T. MacFALL,
Att'ys for Sarah A. Hibben.

And afterwards, to-wit: on the 17th day of November, 1900, being the 12th judicial day of the November term, 1900, of said court, the following proceeding was had herein, viz:

Plaintiff files demurrer to the cross complaint herein, as follows:

Demurrer to Cross-comp. by Smith.

STATE OF INDIANA, } *ss:*
Marion County, }

In the Superior Court, Room 3.

WILLIAM C. SMITH
vs.
SARAH A. HIBBEN ET AL. } No. 58774. Demurrer to Cross-complaint.

William C. Smith, plaintiff in the above entitled cause, and defendant named in the cross-complaint of Sarah A. Hibben herein

filed, demurs to each and every paragraph separately of the said cross-complaint and for a cause of demurrer says that neither of said paragraphs of cross-complaint states facts sufficient to constitute a cause of action against this defendant thereto.

Wherefore, he prays judgement.

HARVEY, PICKENS, COX & KAHN,
For Smith.

Memo.

See brief on dem. to ans.

H., P., C. & K.

Demurrer to Cross-comp. Sust.

And afterwards to-wit: on the 21st day of November, 1900, being the 15th judicial day of the November term 1900 of said court before the same hon. judge, the following proceedings were had herein, viz: "Come the parties by counsel, and the court, being fully advised in the premises, sustains the plaintiff's demurrer to the
89 cross-complaint of the defendant, Sarah A. Hibben, to which ruling said defendant, at the time excepts."

And now the defendants, Financial Exchange and Joseph H. Pattison each files demurrer to the cross-complaint of the defendant, Sarah A. Hibben, herein.

And now comes the defendant, Indiana Bermudez Asphalt Company, and files its disclaimer herein. Said demurrer and said disclaimer herein are in the words and figures following:"

Demurrer to Cross-Comp. by Financial Exchange & Pattison.

STATE OF INDIANA, } ss:
County of Marion, }

In the Marion Superior Court, Room 3.

WILLIAM C. SMITH
vs.
SARAH A. HIBBEN ET AL. } No. 58774. Demurrer to the Cross-complaint.

— the defendants, Financial Exchange, Joseph H. Pattison and separately demur to the cross-complaint of the defendant, Sarah A. Hibben, and for ground for demurrer, say that said cross complaint does not state facts sufficient to constitute a cause of action against either of said defendants.

AYRES, JONES & HOLLETT,
Att'ys for Defendants.

Disclaimer of Ind. Bermudez Asphalt Co.

STATE OF INDIANA, } ss:
County of Marion, }

In the Marion Superior Court, Room 3.

WILLIAM C. SMITH } No. 58774. Disclaimer.
vs.
SARAH A. HIBBEN. }

The defendant, Indiana Bermudez Asphalt Company for separate answer to the cross complaint of the defendant, Sarah A. Hibben, says that it disclaims any interest in the matters in controversy herein and asks judgment for its costs.

AYRES, JONES & HOLLETT,
89½ *Att'ys for Indiana Bermudez Asphalt Company.*

And afterwards, to-wit: on the 2nd day of December, 1900, being the 9th judicial day of the December term 1900 of said court, before the same hon. judge, the following proceedings were had herein:

Demurrer of Pattison, Churchman, and Financial Exchange to Cross-comp. Sustained.

STATE OF INDIANA, } ss:
County of Marion, }

Superior Court, Room 3.

WILLIAM C. SMITH } No. 58774. Decree.
vs.
SARAH A. HIBBEN ET AL. }

Comes now the plaintiff by Harvey, Pickens, Cox & Kahn, his attorneys, and comes also the defendant, Sarah A. Hibben, by her attorneys, M. W. Hopkins and R. T. MacFall and come also the defendants, Joseph H. Pattision and William F. Churchman, partners trading as the Financial Exchange, by their attorneys, Ayres, Jones & Hollett, and the court sustains demurrer of Pattison and
90 Churchman and Financial Exchange to each paragraph of cross-complaint of defendant, Sarah A. Hibben, to which ruling defendant Hibben at the time excepts, and this cause is now dismissed by the plaintiff as to the defendant Elwood W. Seamans, and the defendant, Sarah A. Hibben also dismisses her cross-complaint as to said defendant, Elwood W. Seamans, and the plaintiff by leave of court dismisses his complaint as to the property next hereinafter described in so far as said complaint seeks to foreclose a lien thereon, to wit:—

All that part of the west half of the southwest quarter of sec. three (3) township fifteen (15) north, range four (4) east, fronting south on Washington street eleven hundred, fifty seven and two one hundreths (1157.02) feet, measuring east from a point — feet east of the west line of said quarter section and extending north one hundred fifty (150) feet, the entire length of said eleven hundred, fifty seven and two one hundredths (1157.02) feet.

And the defendant, Sarah A. Hibben, now by leave of court withdraws her first paragraph of answer in general denial heretofore filed in this cause and now in open court elects to stand by the answers to the complaint herein filed and by her cross-complaint herein filed and said defendant having declined, failed and refused to plead further to said complaint or by said cross complaint though by the court ruled so to do, the court renders judgment upon the complaint as upon default, upon the demurrers to the second, third and fourth paragraphs of answer of defendant, Sarah A. Hibben and upon the demurrers to the first, second, third and fourth paragraphs of the cross complaint of defendant, Sarah A. Hibben, and upon the said election and refusal of the said Sarah A. Hibben to plead further.

Decree.

Whereupon the court finds the allegations of said com-
91 plaint to be true in substance and in fact and that plaintiff should recover and have relief as therein prayed and as against the property hereinafter described.

It is therefore considered, ordered, adjudged and decreed by the court that the defendant, Sarah A. Hibben, take nothing by her cross-complaint, and that the plaintiff and the defendants, Joseph H. Pattison and William F. Churchman, recover of the defendant, Sarah A. Hibben, their costs and charges in behalf of said cross-complaint laid out and expended, to which judgment the defendant, Sarah A. Hibben, now excepts.

It is further considered, ordered, adjudged and decreed by the court that the plaintiff, William C. Smith, has a lien upon lots fifty-three (53), fifty-four (54), fifty-five (55), fifty-six (56), fifty-seven (57), fifty-eight (58) and fifty-nine (59) in Pattison's University place, an addition to the town of Irvington, in Marion county, in the State of Indiana, for the sum of one hundred, forty one dollars and sixty cents (141.60) upon each of said lots with interest thereon at the rate of 6% per annum, from the 28th day of January, 1899, making total on each of said lots to date hereof one hundred, fifty seven dollars and forty-six cents (157.46), principal and interest, and for the further sum of twenty-one dollars and forty-eight cents ($21.48) upon each of said lots as and for attorney's fees aggregating on each lot one hundred, seventy-eight dollars and ninety four cents (178.94); it is further ordered, adjudged and decreed that the plaintiff William C. Smith, has a lien upon lot 60 in said Pattison's University place, for the sum of three hundred, twenty seven dollars and forty five

cents ($327.45) with interest thereon at the rate of 6% per annum, from the 28th day of January, 1899, making the total
92 sum of three hundred sixty four dollars and twenty four cents ($364.24), principal and interest on said lot to date hereof, and for the further sum of forty nine dollars and sixty four cents ($49.64) as and for attorney's fees, aggregating on said lot four hundred, thirteen dollars and eighty eight — ($413.88), said aggregate amounts to bear interest from date hereof at the rate of 6% per annum.

That the costs of this action, accrued and to accrue, are a lien upon said lots in the follow proportion and are hereby apportioned among said lots in the following proportion, to-wit, a sixteen, one hundred and forty ninth (16/149) part of the costs upon each of said lots numbered fifty three (53), fifty-four (54), fifty-five (55), fifty-six (56), fifty-seven (57), fifty-eight (58) and fifty-nine (59) and a thirty-seven one hundred, forty ninth (37/149) part of the costs upon said lot numbered sixty (60).

That said liens are now due and unpaid and that the same be and hereby are foreclosed and all equities of redemption of the said defendant, Sarah A. Hibben, therein barred except as by law provided.

It is further considered, ordered, adjudged and decreed that the defendant, Sarah A. Hibben, or any one in her behalf, may discharge said liens or any of them before sale as herein ordered by paying to the clerk of this court the amount of the assessment, interest, attorney's fees and costs herein adjudged, decreed and apportioned against such lot; and in the event that said liens or any of them shall be so discharged said clerk shall make distribution in the same manner as hereinafter ordered, provided, that after the payment of costs as herein ordered, the clerk shall deduct from the amount coming into his hands the portion thereof paid as at-
93 torney's fees and interest thereon, which portion shall be paid by him to the plaintiff's attorneys as herein adjudged and pay the balance to Pattison and Churchman or to plaintiff as hereinafter ordered

That said lots and each of them be sold separately by the sheriff of Marion county, Indiana, by virtue of a certified copy hereof duly issued to him, as other lands are sold upon execution in the State of Indiana.

That the proceeds of such sales of each lot, not exceeding in the aggregate the total amount of the assessment interest, attorney's fees and costs hereinbefore adjudged, decreed and apportioned against such lot be applied by said sheriff as follows:

First. To the payment of the part of the costs accrued and to accrue apportioned to such lot.

Second. To the payment to plaintiff's attorneys of the amount of attorney's fees as hereinbefore found, adjudged and apportioned to such lot and interest thereon at the rate of 6% per annum from date of this judgment.

Third. By the payment to the clerk of this court of any balance

of the above described proceeds to be by said clerk paid to the defendants, Joseph H. Pattison and William F. Churchman, partners trading as the Financial Exchange, provided that when such payments to such partners shall amount to the sum of nine thousand, three hundred, eighty-seven dollars and sixteen cents ($9,387.16) with interest thereon at the rate of 8 % per annum. from November 2d, 1900, and the further sum of one thousand, six hundred, ten dollars and seventy-nine cents ($1,610.79) without interest, or when the said defendants trading as the Financial Exchange shall have receipted to said clerk for the full amount of their said above described claim,
said clerk shall pay such balances over to the said plaintiff,
94 William C. Smith, or his attorney of record.

Fourth. In the event that any lot shall sell for a sum in excess of the assessment, interest, attorney's fees and costs, hereinbefore adjudged and apportioned against such lot, such excess or excesses shall be paid by the sheriff to the defendant, Sarah A. Hibben.

All of which is finally considered, ordered, decreed and adjudged by the court. To all of which the defendant, Sarah A. Hibben, now excepts.

And afterwards to-wit: on the 22nd day of December, 1900, being the 18th judicial day of the said December term 1900 of said court, before the same hon. judge, the following proceedings were had herein; "Comes the defendant, Sarah A. Hibben, by counsel, and prays an appeal of this cause to the supreme court of Indiana, which is granted upon said defendant filing an appeal bond herein in the sum of five hundred dollars ($500.00) within ten (10) days from this date. And now the said defendant files an appeal bond herein and the same is approved by the court and is as follows:

Appeal Prayed, Granted, Bond Filed.

Know all men by these presents, that we, Sarah A. Hibben as principal and Thos. E. Hibben as surety hereon, are held and firmly bound unto William C. Smith, Joseph H. Pattison and William F. Churchman, in the principal sum of five hundred dollars ($500), to the payment of which well and truly to be made and done we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 18th day of December, 1900.

The condition of the above obligation is such, that whereas heretofore to-wit: on the 12th day of December, 1900, the said William
C. Smith, Joseph H. Pattison and William F. Churchman in
95 room 3 of the superior court of Marion county in the State of
Indiana in cause No. 58774, recovered a judgment against the said Sarah A. Hibben for the foreclosure of a lien upon lots fifty three (53), fifty-four (54), fifty-five (55), fifty-six (56), fifty-seven (57), fifty-eight (58), fifty-nine (59) and sixty (60) in Pattison's University place, an addition to the town of Irvington, Marion county, in the

State of Indiana, said lien being for the amount of a certain street assessment, with interest, attorney's fees and costs, from which said judgment of said superior court the said Sarah A. Hibben has appealed to the supreme court of Indiana.

Now if the said Sarah A. Hibben shall well and truly prosecute said appeal and abide by and pay the judgment and costs which may be rendered or affirmed against her, then the above obligation to be null and void; otherwise to be and remain in full force and virtue in law.

SARAH A. HIBBEN.
THOS. E. HIBBEN.

Approved this 22nd day of December, 1900.

VINSON CARTER,
Judge of the Superior Court of Marion County, Room 3.

STATE OF INDIANA, } ss:
County of Marion, }

Thomas E. Hibben, being first duly sworn upon his oath, says that he is the owner of unincumbered real estate in Marion county, in the State of Indiana, exceeding in value five thousand dollars and that he makes this affidavit to induce the court to accept the above bond.

THOS. E. HIBBEN.

Subscribed and sworn to before the undersigned, this 18th day of December, 1900.

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[SEAL.]

CHAS. H. SMITH,
Notary Public.

On January 12th, 1901, the following precipe was duly entered in the "Precipe Book" of the county clerk's office Marion county, Indiana.

Præcipe.

STATE OF INDIANA, } ss:
County of Marion, }

In the Superior Court, Room 3.

WILLIAM C. SMITH
vs.
SARAH A. HIBBEN ET AL. } No. 58774. Præcipe.

To the clerk of the superior court of Marion county, Indiana:

The defendant, Sarah A. Hibben, requests you to prepare and properly certify for use on appeal to the supreme court of Indiana a

transcript of all papers filed in said cause and all orders and rulings and the judgement therein rendered.

MURAT W. HOPKINS,
RUSSELL T. MacFALL,
Attorneys for Defendant, Sarah A. Hibben.

STATE OF INDIANA, } ss :
County of Marion, }

I, George B. Elliott, clerk of the superior court within and for the county aforesaid, do hereby certify that the foregoing transcript contains full, true and complete copies of all the entries of proceedings had and of papers filed in said superior court in cause numbered 58,774 as appear from the records and files thereof, now in my custody and keeping.

In testimony whereof, I hereunto subscribe my name and affix the seal of said superior court at my office in the city of Indianapolis the 15th day of January, A. D. 1901.

97 [SEAL.] GEORGE B. ELLIOTT, *Clerk.*

STATE OF INDIANA :

In the Supreme Court.

SARAH A. HIBBEN, Appellant,
vs.
WILLIAM C. SMITH, JOSEPH H. PATTISON, and William F. Churchman, Partners Trading as the Financial Exchange; Financial Exchange, and Joseph H. Pattison, Appellees.

No. 19564. Assignment of Errors. Filed Jan. 28, 1901. R. A. Brown, Clerk.

The appellant, Sarah A. Hibben, says there is manifest error in the judgement and proceedings in this cause in this :—

First. The court erred in overruling appellant's demurrer to the complaint of appellee, William C. Smith.

Second. The court erred in sustaining the demurrers of appellee, William C. Smith, to the second, third and fourth paragraphs of appellant's answer and each of them.

Third. The court erred in sustaining the demurrers of the appellee, William C. Smith, to the first, second, third and fourth paragraphs of appellant's cross-complaint, and each of them.

Fourth. The court erred in sustaining the demurrer of the appellees, The Financial Exchange and Joseph H. Pattison to appellant's cross-complaint.

Fifth. The court erred in sustaining the demurrers of the appellees, The Financial Exchange and Joseph H. Pattison to the
98 first, second, third and fourth paragraphs of appellant's cross-complaint, and each of them.

Sixth. The court erred in sustaining the demurrers of appellee, The Financial Exchange to the first, second, third and fourth paragraphs of appellant's cross-complaint, and each of them.

Seventh. The court erred in sustaining the demurrers of appellee, Joseph H. Pattison to the first, second, third and fourth paragraphs of appellant's cross-complaint, and each of them.

Wherefore appellant prays that the judgement be reversed.

MURAT W. HOPKINS,
RUSSELL F. MACFALL,
Attorneys for Appellant.

99 And afterwards, to-wit: on the 27th day of February, 1901, the same being the 81st judicial day of the November term, 1900, of said supreme court, the following further pleas and proceedings were had in said cause to-wit:

Come now the parties, by their counsel, and this cause is submitted to the court for judgment and decree as provided by the act of the General Assembly of the State of Indiana, approved April 13, 1885, and the rules of said supreme court adopted in relation thereto.

And afterwards, to-wit: on the 27th day of April 1901, the following further pleas and proceedings were had herein:

Comes now the appellant, by counsel, and files her brief, in the words and figures following: (Here insert.)

And comes now the appellant, by counsel, and files a petition for oral argument, in the words and figures following: (Here insert.)

And afterwards, to-wit: on the 23rd day of May, 1901, the following further pleas and proceedings were had herein:

Comes now the appellees, by counsel, and file their petition for extension of time in which to file brief, in the words and figures following: (Here insert.)

And afterwards, to-wit: on the 28th day of May, 1901, the following further pleas and proceedings were had herein:

Come now the parties, by counsel, and the court being fully advised in the premises, the appellees' petition for an extension of time is granted and fifteen days' additional time given.

100 And afterwards, to-wit: on the 12th day of June, 1901 the following further pleas and proceedings were had herein:

Come now the appellees, by their counsel, and file their brief, in the words and figures following: (Here insert.)

And afterwards, to-wit: on the 27th day of June, 1901, the following further pleas and proceedings were had herein:

Comes now the appellant, by counsel, and files her reply brief, in the words and figures following: (Here insert.)

And afterwards, to-wit: on the 7th day of December, 1901, the following further pleas and proceedings were had herein:

Come now the appellees, by counsel, and file petition to fix date for oral argument, in the words and figures following: (Here insert.)

And afterwards, to-wit: on the 12th day of December, 1901, the following further pleas and proceedings were had herein:

Come now the parties, by counsel, and the court being fully advised in the premises, sets said cause for oral argument on December 19, 1901, and notices thereof are duly issued.

And afterwards, to-wit: on the 9th day of January, 1902, the same being the 40th judicial day of the November term, 1901, of said court, the following further pleas and proceedings were had herein:

Come now the parties, by counsel, and the court being sufficiently advised in the premises, now *affirms* the decision and judgment of the court below in the above entitled cause, with an opinion pronounced by Jordan, C. J., in the words and figures following:

101 JORDAN, *C. J.*:

This action was instituted by appellee in the lower court to enforce an assessment lien against certain lots of real estate owned by appellant, and situated in the incorporated town of Irvington, Marion county, Ind. The assessment in question is for the improvement of Washington street, in said town. A demurrer by appellant to the complaint was overruled, and she filed an answer in five paragraphs, the first of which was a general denial, which was subsequently withdrawn. The fifth paragraph of her answer was addressed to so much of the complaint as sought to enforce the lien against certain unplatted land. Appellant also filed a cross complaint, in four paragraphs whereof she sought to have the assessment in controversy declared illegal and void, and her title to the realty, as against the lien thereunder quieted. The fifth paragraph of the cross complaint was addressed only to the unplatted land. A demurrer to the second, third, and fourth paragraphs of the answer was sustained, and overruled as to the fifth paragraph. A demurrer to each paragraph of the cross complaint was also sustained. Appellee dismissed so much of his complaint as sought to enforce the lien against the unplatted real estate. Having withdrawn her denial, appellant elected to stand by her answer and cross complaint; and, on her refusal to further plead, the court rendered its judgment foreclosing the assessment lien, and decreed a sale of each of the lots in satisfaction of the lien thereon. From this judgment appellant appeals, and predicates her errors on the court's ruling on the demurrers to the several pleadings, as previously mentioned.

The constitutionality of the street improvement statute known as the "Barrett law," under which the street was improved, is called

in question and fully discussed by counsel for appellant. This litigation arises out of the same street improvement involved in the appeal of Shank *v.* Smith (at last term) 61 N. E. 932; and the questions, in the main, are the same as were presented and reviewed in that appeal, and decided adversely to the contention of appellant. Upon the authority of that decision, her claim in this case in respect to the principal points upon which she relies for a reversal must be denied. The validity of the Barrett law has been repeatedly sustained by this court, and must be considered as no longer an open question. Leeds *v.* De Frees (at last term) 61 N. E. 930. In the latter case, in speaking of the hearing which the statute accorded to property owners in regard to assessments made against their property, we said: "The statute in question, as shown, provides a tribunal for that purpose, and further provides that an aggrieved person shall have the right to appear before it and be accorded a hearing on his objections to the proposed assessment. The power to hear the complaint of the aggrieved owner carries with it such implied power as will make the hearing effectual; for the rule is well settled
102 that, when a general power is granted by a statute, every necessary power for the effectual exercise thereof is given by implication. (Citing authorities.) Possessing such general power under the statute, the council certainly had the right upon a hearing to award adequate and effectual relief by ultimately apportioning the cost of the improvement to the several pieces of property according to the benefits resulting to each on account of the improvement. It is true that the statute provides what may be considered as *prima facie* evidence of the benefits received by abutting property, but such standard or evidence is not conclusive, as the council has the right to so apportion the cost as to make it conform to the benefits derived." In the case at bar no facts are disclosed by the record to establish that the action or proceedings of the board of trustees of the town of Irvington in making the improvement and assessment in controversy are void. It is fully disclosed that under the law the board had and retained complete jurisdiction over the subject-matter, and was invested with the authority and power to make the improvement; and by virtue of the steps taken and the notices given the board also acquired jurisdiction over the person of the appellant, an abutting property owner, and thereby had the power and authority to subject her said property to an assessment of such benefits as were derived by it by virtue of the improvement in controversy. Possessing the power to hear and determine under the statute in regard to the amount that ought to be assessed against appellant's property as benefits derived by reason of the improvement, the fact that the board through its misinterpretation of the law or otherwise, may have decided erroneously in regard to that question, will not suffice to expose its judgment to the collateral attack which appellant seeks under her pleadings to make; for the rule is well settled in such cases that, where a tribunal is invested with the power to decide in a matter, such authority carries with it, by neces-

sary implication, the power to decide wrong as well as right. Board *v.* Markle, 46 Ind. 96. So long as the board of trustees keeps within the limits of its jurisdiction, its decision or judgment in the premises must be held to be binding and conclusive on all persons concerned until set aside or annulled by some direct proceeding known to the law, based on reasons or grounds which the law recognizes as sufficient for that purpose. City of Ft. Wayne *v.* Cody, 43 Ind. 197; Anderson *v.* Baker, 98 Ind. 587; Sunier *v.* Miller, 105 Ind. 393, 4 N. E. 867; Garvin *v.* Daussman, 114 Ind. 429, 16 N. E. 826, 5 Am. St. Rep. 637; Motz *v.* City of Detroit, 18 Mich. 495; Harman *v.* Moore, 112 Ind. 227, 13 N. E. 718; School Tp. *v.* Irwin, 150 Ind. 12, 49 N. E. 806; Kirsch *v.* Braun, 153 Ind. 247, 53 N. E. 1082; Black, 103 Judgm. §§ 290, 291. The doctrine seems to be well settled that in order to render a judgment of a court or other tribunal invested with the power to decide in a matter void, so as to open such judgment to a collateral attack, an absence must be shown of either—First, a legal organization of the tribunal; or, second, jurisdiction over the subject-matter; or, third, jurisdiction over the person; or, fourth, one or more of these matters must appear to have been lost after it or they once existed. Van Fleet, Coll. Attack, § 16.

It was the duty of the board to accord appellant, as a property owner affected by the assessment, a hearing as contemplated by the statute, and upon its refusal to do so the law afforded her an adequate remedy for coercing the board to grant her such right. Shank *v.* Smith, *supra*. The fact that the board may have declined to award her a hearing, or refused to receive and consider the facts or evidence which she offered for the purpose of rebutting the *prima facie* test or standard which the statute provided for the measurement, in the first instance, of the benefits to her property, would not open the door to a collateral assault on its judgment. The defense which appellant sought to make against the enforcement of the assessment, and the relief which she sought to obtain under the facts alleged in the first, second, third, and fourth paragraphs of her cross complaint, were nothing more than a collateral attack on the judgment of the board. When sections 3 and 7 of the Barrett law (sections 4290, 4294, Burns' Ann. St., 1894) are construed in connection with each other, it is manifest that the assessment levied by a board of trustees or by a common council of a city, as the case may be, for the improvements authorized by the statute, together with the interest accruing after such assessment is made, becomes a lien, to the extent of a tax lien, from the time or date at which the improvement or work was ordered. The power and duty of the board of trustees or common council, as the case may be, under the statute, to make an assessment for such improvements, continue in that tribunal until legally exercised. While it is true that a void assessment may be defeated or set aside and held for naught in a collateral action, still, under such circumstances, if the principal proceedings of the board upon which an assessment must rest are not also void, a valid reassessment may be made, by which the objectionable matters or grounds which resulted in rendering the first assessment

invalid may be avoided. Consequently, while an invalid assessment may be set aside, or its enforcement defeated, still the court, under its judgment, in so doing, would not be authorized thereby to impose or destroy the lien arising out of a subsequent reassessment; and such lien, as previously stated, would attach to the property as of the date when the improvement in question was ordered to be made. Balfe *v.* Johnson, 40 Ind., 235; Ball *v.* Balfe, 41 Ind., 221; Reeves *v.* Grottendick, 131 Ind., 107, 30 N. E. 889; Sands *v.* Hatfield, 7 Ind. App., 357, 34 N. E. 654; Becker *v.* Railway Co., 17 Ind. App., 324, 46 N. E. 685; Wats. St. Liens, § 1224.

We have examined and fully considered all of the questions discussed by appellant's learned counsel, but discover nothing in the record to justify a reversal. The judgment is therefore affirmed. All concur, except Baker, J., not participating.

It is therefore considered by the court that the judgment of the court below in the above entitled cause, be in all things affirmed at the cost of the appellant, all of which is ordered to be certified to said court.

And it is further considered by the court, that the appellees recover of the appellant the sum of — for their costs and charges in this behalf expended.

104 And afterwards, to-wit: on the 8th day of March, 1902, the following further pleas and proceedings were had herein:

Comes now the appellant, by counsel, and files her petition for a rehearing and brief thereon, in the words and figures following: (Here insert.)

And afterwards, to-wit: on the 13th day of March, 1902, the following further pleas and proceedings were had herein:

Come now the appellees, by counsel, and file their brief on the petition for a rehearing, in the words and figures following; (Here insert.)

And afterwards, to-wit: on the 14th day of March, 1902, the following further pleas and proceedings were had herein:

Come now the parties, by counsel, and the court being fully advised in the premises, overrules the petition for a rehearing heretofore filed by appellant.

105 And afterwards, to-wit: on the 2nd day of May, 1902, the same being the 137th judicial day of the May term, 1902, of said supreme court of the State of Indiana, the following further pleas and proceedings were had herein:

Comes now the appellant, by counsel, and files in the office of the clerk of the supreme court, her petition for an allowance of a writ of error, said petition being next below attached:

105½ In the Supreme Court of Indiana.

SARAH A. HIBBEN
v.
WILLIAM C. SMITH, JOSEPH H. PATTISON, and William F. Churchman, Partners Trading as the Financial Exchange; The Financial Exchange, Joseph H. Pattison.

Petition for Allowance of Writ of Error to Supreme Court of Indiana.

The petition of Sarah A. Hibben respectfully shows that on the ninth day of January, A. D., 1902, the supreme court of Indiana, rendered a judgment against your petitioner in a certain cause wherein your petitioner was appellant and William C. Smith, Joseph H. Pattison and William F. Churchman, partners trading as the Financial Exchange, The Financial Exchange and Joseph H. Pattison were appellees; and that on the fourteenth day of March, 1902, the said supreme court of Indiana overruled your petitioner's petition for a rehearing in said cause; that said judgment affirmed a judgment and a decree rendered against your petitioner by the superior court of Marion county, Indiana, in a cause wherein said William C. Smith was plaintiff and your petitioner together with said Joseph H. Pattison and William F. Churchman, partners trading as the Financial Exchange, The Financial Exchange and Joseph H. Pattison were defendants, and that said decree directed the sale of certain real estate belonging to your petitioner to satisfy certain street improvement liens amounting with principal, interest and attorneys' fees to an aggregate of one thousand, six hundred, sixty-six and $\frac{46}{100}$ dollars, with interest at six per cent. thereon from the twelfth day of December, 1900, and that said decree awarded
106 order of sale thereon, as will appear by reference to the record and proceedings in said cause, and that said supreme court of Indiana is the highest court of said State in which a decision in said suit could be had.

And your petitioner claims the right to remove said judgment and decree to the Supreme Court of the United States, by writ of error, under the statute of the United States authorizing writs of error to State courts being section 709 of the Revised Statutes of the United States, because on the hearing and trial before said superior court of Marion county and also on said hearing before said supreme court of Indiana your petitioner contended and claimed that the statutes of the State of Indiana, the ordinances, acts and proceedings of the town board of trustees, which authorized and directed the making of the street improvement for which such assessment liens were levied, and also the said assessment liens, were each and all, null, void, invalid and of no force and effect for the reason that they and each of them failed to afford to your petitioner due process of law and that each and all were contrary to and in violation of the Constitution of the United States and particularly of section 1 of the fourteenth amendment to the Constitution of the United States;

that said superior court of Marion county and said supreme court of Indiana decided that the said statutes of the State of Indiana and the said ordinances, acts and proceedings of the said town board of trustees and the said assessments and the liens thereof and each and all of them were valid and did afford your petitioner due process of law and were not contrary to or in violation of the said Constitution of the United States.

Your petitioner further alleges that the said statutes of the State of Indiana approved March 8th, 1899, being sections 4238 to 4299, both inclusive of Burn's Revised Statutes of 1894; and that all the acts, ordinances and proceedings of the town board of trustees
107 of the town of Irvington in reference to the making of the assessments upon which said judgment and decree was rendered and the said assessments and the liens thereof, are null, void, invalid and of no effect for the reason that all and each of them fail to afford to your petitioner due process of law and all and each are opposed to and contrary to the Constitution of the United States, and particularly to section 1 of the fourteenth amendment to the Constitution of the United States, all of which appears by the record of the proceedings in said cause, and in the assignment of errors which is herewith submitted.

Wherefore your petitioner prays the allowance of a writ of error returnable into the Supreme Court of the United States, and for citation and supersedeas; and your petitioner will ever pray for the correction of errors so complained of and for a reversal of said judgment and decree.

Dated at Indianapolis, Indiana, May 2, 1902.

SARAH A. HIBBEN, *Petitioner.*
MURAT W. HOPKINS,
RUSSELL T. MACFALL,
Attorneys for Petitioner.

Granted by the court this May 2d 1902.

JAS. H. JORDAN,
Chief Justice Supreme Court of Indiana.

108 [Endorsed:] 19564 Sarah A. Hibben *vs.* William C. Smith *et al.* Petition for allowance of writ of error Murat W. Hopkins, attorney, 1202–5–16 Stevenson building, Indianapolis, Ind. Filed May 2 1902 R. A. Brown, clerk.

109 And on the same day came again the said appellant, by counsel, and filed in the office of the clerk of said supreme court, a writ of error from the Supreme Court of the United States, to the said supreme court of Indiana, in this cause, said writ of error being hereto next below attached, and being as follows:

110 UNITED STATES OF AMERICA:

The President of the United States of America to the judges of the supreme court of Indiana, Greeting:

Because on the record and proceedings, as also on the rendition of a judgment in a plea which is in the said supreme court, before you, between Sarah A. Hibben and William C. Smith, Joseph H. Pattison, & William F. Churchman partners trading as the Financial Exchange, The Financial Exchange and Joseph H. Pattison a manifest error hath happened to the great damage of the said Sarah A. Hibben as by her complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington thirty days after the date hereof, in the said Supreme Court of the United States to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, this 2d day of May A. D. 1902.

[Seal Circuit Court of the United States, District of Indiana.]

NOBLE C. BUTLER, *Clerk*.

[Endorsed:] Filed May 2 1902 R. A. Brown clerk.

111 And on the same day came again the appellant, by counsel, and filed in the office of the clerk of said supreme court, its bond on appeal, in the penal sum of four thousand ($4,000) dollars, which said bond is now taken and approved and is hereto next below attached:

112 In the Supreme Court of the United States.

SARAH A. HIBBEN
vs.
WILLIAM C. SMITH, JOSEPH H. PATTISON, and WILLIAM F. Churchman, Partners Trading as the Financial Exchange; The Financial Exchange, Joseph H. Pattison. } No. —.

Know all men by these presents, that we Sarah A. Hibben, Harold B. Hibben and Thomas E. Hibben are held and firmly bound unto the above named William C. Smith Joseph H. Pattison and William

F. Churchman partners trading as the Financial Exchange, the Financial Exchange, and Joseph H. Pattison in the sum of four thousand dollars to be paid to said obligees to which payment, well and truly to be made, we bind ourselves jointly and severally, and our and each of our heirs, executors and administrators, jointly by these presents.

Sealed with our seals and dated this 2nd day of May 1902.

113 Whereas, the above named Sarah A. Hibben hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above entitled suit, by the supreme court of Indiana: Now, therefore, the condition of this obligation is, that if the above named Sarah A. Hibben shall prosecute her said writ of error to effect and answer all costs and damages that may be adjudged or awarded against her if she shall fail to make good her plea, then this obligation to be void; otherwise in full force.

SARAH A. HIBBEN. [SEAL.]
HAROLD B. HIBBEN. [SEAL.]
THOS. E. HIBBEN. [SEAL.]

Sealed and delivered in presence of—
MURAT W. HOPKINS.

Taken and approved by me this 2 day of May 1902.
JAS. H. JORDAN,
C. J. Supreme Court of Indiana.

STATE OF INDIANA, *Marion County,* } *ss:*

Harold B. Hibben and Thomas E. Hibben, being both duly sworn upon their several oaths, say that they are each the owner of unencumbered real estate in Marion county, in the State of Indiana, worth to exceed five thousand dollars ($5,000.00).

HAROLD B. HIBBEN.
THOS. E. HIBBEN.

Subscribed and sworn to before me this the 2nd day of May, 1902. Commission expires Dec. 16th 1903.

[Seal Notary Public, State of Indiana.]

MURAT W. HOPKINS,
Notary Public.

Filed May 2 1902.

R. A. BROWN, *Clerk.*

114 And on the same day came again the appellant, by counsel, and filed in the office of the clerk of said supreme court, the citation on said writ of error, duly signed by Hon. James H. Jordan, chief justice of this court, and proof of service of the citation on the

defendants in error, said citation and proof of service thereof being hereto next below attached and being as follows:

115 UNITED STATES OF AMERICA, ss:

The President of the United States to William C. Smith, Joseph H. Pattison, and William F. Churchman, partners trading as the Financial Exchange; the Financial Exchange, and Joseph H. Pattison, Greeting:

You are hereby cited and admonished to be and appear at the United States Supreme Court to be holden at the city of Washington on the 1st day of June next, 1902 pursuant to an order allowing an appeal entered in the clerk's office of the supreme court of the State of Indiana in that certain action numbered 19564, in which Sarah A. Hibben is appellant and you are appellee, to show cause, if any there be why the judgment and decree rendered against the said appellant, as in the said order allowing an appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James H. Jordan, chief justice of the supreme court of Indiana.

This the 2nd day of May, 1902.

JAS. H. JORDAN,
Chief Justice Supreme Court of Indiana.

Filed May 13 1902

R. A. BROWN, *Clerk.*

UNITED STATES OF AMERICA, }
District of Indiana. }

I received this writ at Indianapolis May 9, 1902 at 4 o'clock p. m., and served the same as follows: Upon William C. Smith and Joseph H. Pattison, by reading to, in the hearing of, and by delivering a copy of this writ to each of them. Upon the Financial Exchange by reading to, in the hearing of, and by delivering a copy of this writ to each William F. Churchman and Joseph H. Pattison, partners in the said Financial Exchange, at Indianapolis May 10, 1902

HENRY C. PETTIT,
U. S. Marshal, District of Indiana,
By ALONZO BOYD, *Deputy.*

Marshal's costs $8.25.

116 [Endorsed:] Filed May 2 1902 R. A. Brown, clerk.

117 And on the same day came again the appellant, by counsel, and filed in the office of the clerk of said supreme court, an assignment of errors in the Supreme Court of the United States, on

the writ of error herein, said assignment of errors being hereto next below attached, and being as follows:

118 In the Supreme Court of the United States.

SARAH A. HIBBEN
v.
WILLIAM C. SMITH, JOSEPH H. PATTISON, and William F. Churchman, Partners Trading as the Financial Exchange; The Financial Exchange, Joseph H. Pattison. } Assignment of Errors.

On writ of error to the supreme court of Indiana.

The appellant in this action in connection with her petition for a writ of error, makes the following assignment of errors which she avers occurred in the proceedings on the hearing and determination of said cause in the supreme court of Indiana, to-wit:—

First. The supreme court of Indiana erred in affirming the judgment and decree of the superior court of Marion county, Indiana.

Second. The supreme court of Indiana erred in overruling appellant's petition for a rehearing.

Third. The supreme court of Indiana erred in holding that the act of the General Assembly of the State of Indiana approved March 8, 1889, being chapter CXVIII of the laws of the State of Indiana passed at the fifty-sixth regular session of the General Assembly, published in the Acts of 1889, at page 237, and all acts amendatory thereof being sections 4238 to 4299, both inclusive, of Burns' Revision of the Statutes of Indiana of 1894, afforded to appellant due process of law, and that they were not opposed to and in contravention of the Constitution of the United States.

Fourth. That the supreme court of Indiana erred in holding that the ordinances, acts and proceedings of the town board of trustees of the town of Irvington afforded to appellant due
119 process of law, and that they were not opposed to and in contravention of the Constitution of the United States.

Fifth. The supreme court of Indiana erred in holding that the assessments upon appellant's lots were levied by due process of law, as guaranteed by the Constitution of the United States.

Sixth. The supreme court of Indiana erred in holding, that although the State law gave to the board of town trustees exclusive and final jurisdiction of the apportionment of assessments for street improvements, and required said board to judicially apportion such assessments upon the basis of actual special benefits, yet the refusal of such board *of such board* of town trustees to give to appellant a hearing upon the amount of special benefits accruing to her lots and its refusal to permit appellant to introduce evidence as to the amount of actual special benefits accruing to her lots, did not deny to ap-

pellant due process of law, as guaranteed by the Constitution of the United States.

Seventh. The supreme court of Indiana erred in affirming the ruling and judgment of the superior court of Marion county, Indiana, sustaining the demurrer of said William C. Smith to the third and fourth paragraphs of appellant's answer and the second and third paragraphs of appellant's cross-complaint and to each of said paragraphs of answer and of cross-complaint, which paragraphs of answer and of cross-complaint, each, alleged that the acts, ordinances and proceedings of the said board of town trustees, and the said assessments made by said board of trustees did not afford appellant due process of law as guaranteed by the Constitution of the United States for the reason that said board of trustees refused to give to appellant a hearing upon the question of the amount of actual special benefits accruing to her said lots and refused to hear or permit appellant to introduce evidence as to the amount of actual special benefits accruing to her said lots.

120 Eighth. The supreme court of Indiana erred in holding that although the State law gave to the board of town trustees exclusive and final jurisdiction of the apportionment of assessments for street improvements, and required said board to judicially apportion such assessments upon the basis of actual special benefits, yet the assessment and apportionment of actual special benefits upon appellant's lots by a town board of trustees, all of the five members of which were residents and tax payers of the town and two of the members of which owned lots and lands abutting upon the same improvement and at the same time assessed therefor by said board, afforded to appellant due process of law, as guaranteed by the Constitution of the United States.

Ninth. The supreme court of Indiana erred in affirming the ruling and judgment of the superior court of Marion county, Indiana, in sustaining the demurrer of the said William C. Smith to the third and fourth paragraphs of appellant's answers and the second and third paragraphs of appellant's cross-complaint and to each of said paragraphs of said answer and said cross-complaint, which paragraphs of answer and of cross-complaint, each alleged that the acts, ordinances and proceedings of said board of town trustees, and the assessments made by said board of town trustees did not afford to appellant due process of law as guaranteed by the Constitution of the United States for the reason that all of the five members of the board of town trustees which fixed and levied the assessments of actual special benefits upon appellant's lots were residents and tax payers of said town, and that two of said members owned lands and lots abutting upon the same improvement, and at the same time assessed therefor by said board.

Tenth. The supreme court of Indiana erred in holding that a State law which requires assessments for street improvements to be apportioned upon the basis of the actual special benefits, and

121 which provides no method by which such benefits could or might be judicially fixed or determined, afforded to appellant

due process of law, as guaranteed by the Constitution of the United States.

Eleventh. The supreme court of Indiana erred in holding that the arbitrary levy for a street improvement of an assessment in substantial excess of the actual special benefits, which levy was not made according to any prescribed or recognized statutory method, afforded to appellant due process of law, as guaranteed by the Constitution of the United States.

Twelfth. The supreme court of Indiana erred in affirming the ruling and judgment of the superior court of Marion county, Indiana, in sustaining the demurrer of the said William C. Smith to the fourth paragraph of appellant's answer and the second and third paragraphs of appellant's cross-complaint, which paragraphs of answer and cross-complaint each alleged that the assessments against appellant's lots and each of them were not made and levied by due process of law, as guaranteed by the Constitution of the United States for the reason that said assessments and each of them were in substantial excess of the actual special benefits accruing therefrom, and that said assessments were not made and levied according to any prescribed or recognized statutory method.

Dated at Indianapolis, Indiana, May 2, 1902.

SARAH A. HIBBEN, *Petitioner.*
MURAT W. HOPKINS,
RUSSELL T. MACFALL,
Attorneys for Petitioners.

122 [Endorsed:] Supreme Court of United States Sarah A. Hibben *vs.* William C. Smith *et al.* Assignment of errors Filed May 2 1902 R. A. Brown clerk Murat W. Hopkins, attorney, 1202–5–16 Stevenson building, Indianapolis, Ind.

123 I, Robert A. Brown, clerk of the supreme court of the State of Indiana, certify the above and foregoing to be a full, true and complete transcript of the record and proceedings had, papers filed, motions decided, rulings made, opinions delivered, judgments rendered, and all decrees and orders entered in the supreme court of Indiana, in the above entitled cause; also the original writ of error from the Supreme Court of the United States to the supreme court of Indiana in this cause, and the original citation to the defendant in error and proof of service thereof and the original assignment of errors in the Supreme Court of the United States on said writ of error, and the original cost bond.

Which said transcript, annexed hereto, together with said original writ of error, original citation, original assignment of error and original cost bond, I hereby certify as and for my full return to said writ of error.

In witness whereof, I hereto set my hand and affix the seal of said supreme court, at the city of Indianapolis, Indiana, this 17th day of May, 1902.

[Seal Supreme Court, State of Indiana, MDCCCXVI.]

ROB'T A. BROWN,
Clerk Supreme Court of Indiana.

Endorsed on cover: File No. 18548. Indiana supreme court. Term No. 59. Sarah A. Hibben, plaintiff in error, *vs.* William C. Smith, Joseph H. Pattison, & William F. Churchman, partners trading as the Financial Exchange; The Financial Exchange, & Joseph H. Pattison. Filed May 31st, 1902.